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The Nation.

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FIFTEEN YEARS OF THE BURGER COURT

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LETTERS.

HERITAGE AT THE U.N.

Washington

Christopher Hitchens's "Minority Report" is an unfortunate piece of venom [*The Nation*, Sept. 8]. The distorted picture he offers of the Heritage Foundation's research on the United Nations does not, in truth, deserve the dignity of a response. Lest the silence of contempt be mistaken for a plea of nolo contendere, however, let me set the record straight. Since Hitchens's attack is directed almost exclusively at papers I wrote, let me address each of the allegations he attributes to the Heritage Foundation:

§ That the United Nations Association endorses the "Zionism is racism" resolution. This is preposterous. Neither I nor any of my colleagues have ever written such a thing.

§ That "the government of South Africa poses no threat to international peace and is treated as a 'pariah.'" Does he wish to argue that South Africa is *not* so treated? I have pointed out in several papers that South Africa is the only U.N. member that has been illegally denied participation in the General Assembly. Is South Africa more of a threat to peace than, say, Libya? And even if it were, should the rules be suspended for it?

§ That "the office of the U.N. High Commissioner for Refugees [U.N.H.C.R.] allows and even encourages 'terrorists' to operate from its camps in Honduras and the Middle East." Hitchens claims the responsibility for refugee camps rests with the host country and not the United Nations. In the first place, I have never said anything about U.N.H.C.R. camps in the Middle East. He might be thinking of my discussion of the United Nations Relief and Works Agency in Lebanon—where I cited U.N. documents that condemn the agency's support for the P.L.O.—but the relief agency, of course, is not part of the High Commissioner's office, even though it also houses refugees. I do, indeed, accuse the U.N.H.C.R. of having violated one of its own rules, as stated in its *Handbook for Emergencies*, that settlements for refugees should be placed away from border areas. The responsibility for adequate settlement is part of the High Commissioner's job.

§ That Mark Malloch Brown "suppressed evidence that toxic gases were used by Communist forces in Indochina." Hitchens writes that "even *Commentary*, in its April issue, admitted that there was no evidence at all for the scandalous story." I made no such allegation. I cited a *Commentary* article which in turn cited a story by Adelia Bernard so accusing Brown (I duly footnoted the piece). The *Commentary* article explained that Bernard's story is the only evidence, and it has not been corroborated. There was neither denial nor endorsement of that story, either by me or by *Commentary*.

§ That "the Russians wanted a U.S. site for the United Nations in order to facilitate their espionage of America." What I did in fact say in my papers is that the Russians wanted a U.S. site for the United Nations—which is public record. The site, as the F.B.I. has known for years, is being used for espionage. The fine distinctions I make, the careful references, do not deserve Hitchens's coarse representation.

§ That Philip Noel Baker "was a U.S. delegate to the founding conference of the United Nations," although he was in fact British. At last, a truth. My information came from a July 27, 1967, Library of Congress report by Angie Magnusson. I admit that after this experience I have been treating Library of Congress reports with much greater caution.

At the end of his piece, Hitchens applies the *coup de grâce*, saying that "all this" Heritage material is really John Birch Society "stuff." Is he referring to the *Commentary* story? The record of the U.N.H.C.R., which I obtained from unclassified State Department sources? The U.N. Legal Office opinion on participation of U.N. members in the General Assembly? The F.B.I.'s record on Soviet espionage at the United Nations? Hitchens's use of ad hominem arguments—which include characterizing ambassador Jeane Kirkpatrick, a Georgetown professor, as a "pseudo-intellectual" scholastic—is a sure sign of intellectual bankruptcy. I used to advise my students in Logic 101 against such tactics. Evidently, the defenders of the United Nations must be getting desperate. They ought to be.

Juliana Geran Pilon
The Heritage Foundation

A 'NO NUKES' NEW YORK

Brooklyn

I agree with your editorial that placing nuclear weapons in New York City is sheer folly [editorial, "Unsafe Harbor," *The Nation*, Aug. 18-25]. Just the possibility of an accident occurring with one of those devastating weapons is more than enough reason to ban their existence from this populous city.

For that reason I introduced City Council Resolution 364 which calls on the Council to prohibit the "production, transport, storage or deployment of nuclear weapons within the territorial limits of the City of New York and [to proclaim and designate] the City of New York a Nuclear Weapons Free Zone." I am confident that the resolution will pass the Council; it already has the support of eleven co-sponsors and four additional Council members (eighteen are needed to pass).

We have received support for Resolution 364 from across the country and hearings have already taken place. It is up to the citizens of New York City and the entire nation to contact my office and other City Council members to express their support for these measures. This issue is too important to ignore. I urge everyone to get involved.

Abraham G. Gerges
Councilman, 29th District

RED DAWN OVER FORTRESS AMERICA

Brookline, Mass.

Andrew Kopkind's intriguing review of *Red Dawn* was as apt in its analysis of the film's political ambiguities as it was incorrect in assessing its general political impact. While I won't defend the quality of "the worry expended by liberal critics," I believe that their anxieties, however tritely reasoned, have more merit than Kopkind allows ["Films," *The Nation*, Sept. 15].

Yes, *Red Dawn* celebrates popular resistance to imperial takeover with Americans cast in their favorite role: a combination of nonconforming outlaw and righteous vigilante (during the late 1960s the hard hats starred in the streets this way). Noting this pro-guerrilla emphasis, Kopkind writes that "If you read *Red Dawn* as a parable of American intervention in Central America, say, or even an evocation of what might have happened in Poland if the Russians had moved in to crush Solidarity, it's not so hideous." Ah, but that's a *very* big "if." The fact is that the vast majority of *Red Dawn*'s audience will not "read" the movie at all (as Kopkind so cogently does) but will assimilate it unreflectingly. And it is precisely here that the fears of liberal reviewers fail to expose the film's most dangerous qualities. It is bad enough that *Red Dawn* reinforces "fortress America" paranoia. More insidious is how the film's conflict between authority and nonconformity reflects an increasingly right-wing America.

Moreover, fear of rebellious impulses and fantasies, in a world in which dissent is increasingly condemned, leads most people to conform with more fervor in daily life, punitively denying in themselves and in others the drive to resist authority. *Red Dawn* adroitly if unconsciously expresses this commonplace dialectic of denial which underlies all contemporary political trends.

Thanks to Kopkind for a thought-provoking review.

Eugene Narrett

'THE NATION' AND THE COURT

Oral arguments in the Supreme Court case of *Harper & Row Publishers Inc. and The Reader's Digest Association Inc. v. Nation Enterprises and The Nation Associates Inc.* have been scheduled for 2 P.M. on Election Day, November 6.

The Nation welcomes letters—typed, double spaced and no longer than 300 words, please. Letters may be edited for reasons of space.

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EDITORIALS.

As Herman Schwartz, the guest editor of this special issue, points out on page 262, while the Burger Court's overall record on individual rights is, with important exceptions, "surprisingly sympathetic," the trends in recent cases are worrisome.

It should come as no surprise that the swing toward conservatism coincided with the advent of the Reagan Administration. In a speech last week, Justice Harry Blackmun commented that the Court is "moving to the right," going "where it wants to go . . . by hook or by crook."

Despite the Court's shift, the Reagan right continues its attack on judicial review through legislative attempts (thus far unsuccessful) to limit the Court's jurisdiction, to abolish the Legal Services Corporation and so forth. Should Reagan be re-elected we can expect that the next assault will be on the composition of the Court. Five of the nine Supreme Court Justices (including Warren Burger) will be 76 or older on Inauguration Day. Several radically conservative prospects wait in the wings [see Jamie Kalven, "Robert Bork and the Constitution," *The Nation*, October 1, 1983].

Since Presidents come and go but Supreme Court Justices have a way of sticking around, sometimes for life, the unsexy issue of judicial selection ought to be put on the national political agenda before it is too late. And speaking of sex, the reactionary record of Reagan's sole appointee, Justice Sandra Day O'Connor, should serve as a sobering reminder that while affirmative action may be a necessary reason for appointment, it should never be a sufficient one.

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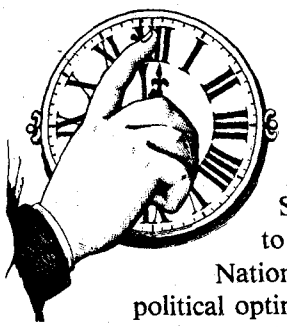
BEAT THE DEVIL.

Minnesota Mondale and the Tempo of Doom

They keep saying that the best reason to vote for Walter Mondale is Ronald Reagan. But since Mondale filed to change his name and political identity to Reagan halfway through September, this argument doesn't carry quite the weight that it once did.

Reagan claims that Nicaragua is exporting revolution to the rest of Central America, and so does Mondale. Reagan says Nicaragua should be "pressured" until it mends its ways, and so does Mondale. Reagan says he will invade Nicaragua if it buys twenty-eight-year-old Soviet MIG-21s to protect itself, and so does Mondale. Reagan says that he supports the policies of Salvadoran President José Napoleón Duarte, and so does Mondale. Reagan justifies the invasion of Grenada by claiming falsely that its purpose was to save endangered Americans, and so does Mondale. Reagan blames the missile crisis in Europe on the Russians, and so does Mondale. Reagan is for increases in military spending, and so is Mondale. Reagan is bad on the Middle East, and Mondale is worse. And finally, Mondale promises to raise taxes and cut social spending.



A week ago I started writing a column showing how the media were setting up Mondale. And so they are. But Mondale is setting himself up. To urge progressives to like a man who takes James Schlesinger and Max Kampelman to a briefing by the director of the National Security Council is to require political optimism unknown since the millenarians of the tenth century. The way things are going Mondale will be lucky to carry Freedom House and maybe the District of Columbia.

Of course we must pray that the Democratic ticket does as well as possible, since anything that slows Reaganism, particularly in Congress, is a plus; right now, though, the best thing going for Mondale is Geraldine Ferraro. Unlike the other three nominees, she at least isn't rolling up a copy of *Time*'s "I Love U.S." issue and shoving it down the front of her jeans to demonstrate the vigor of her male chauvinism (a phrase that until Campaign '84, I had always thought to be a confusion of categories).

Footnote: Since Reagan supports Duarte, and Mondale supports Duarte, people may legitimately ask what Duarte supports. An excellent interview with him by Marc Cooper and Greg Goldin in the November issue of *Playboy* shows that he opposes negotiations with the guerrillas, thinks the war could last a hundred years, regards attempts to investigate the past crimes of the death squads as pointless, opposes any conditions on U.S. aid and disagrees with the late Archbishop Oscar Romero on the matter of orders from man and from God. Duarte says, "It is the one who gives orders who sins or doesn't sin. He who received orders does not sin even though they might violate his own morality. However, he who counsels others to disobey orders with a political objective in mind is also violating the authority of God." They didn't think much of that kind of talk at Nuremberg.

From Lies Immemorial

Amid the great fuss in recent times over forgeries and fakes, one of the most pernicious shams of all has been greeted with rapture. I think we may easily surmise the reason: the fake in question is highly congenial to many supposedly enlightened intellectuals in this country, since it essentially denies the existence of Palestinians in any guise troublesome to Israel and its supporters. Such is the project of Joan Peters's *From Time Immemorial*.

From the hour of its publication, Peters's tract has been heaped with praise. Martin Peretz told readers of *The New Republic*: "[It] could change the mind of our generation. If understood, it could also affect the history of the future." (Note how Peretz sees time as an exercise in propaganda, as he gestures to "the history of the future.") Lucy Davidowicz hailed Peters for having "brought into the light the historical truth about the Mideast." Joining the chorus were Barbara Tuchman, Saul Bellow, Elie Wiesel, Arthur Goldberg and, in *Commentary*, Daniel Pipes.

Peters's work has certain theatrical accouterments traditional to such projects. First, it is the work of someone who claims to have embarked on her researches with a predisposition to Palestinian aspirations and complaints. This kind of thing always goes down well with reviewers, since it evokes the picture of a scholarly mind only gradually, under the impulse of overwhelming facts, freeing itself from the chains of ignorance. Second, it is equipped with an immense *apparatus criticus*. It's often the case that the more bogus the intellectual enterprise, the weightier such apparatus will appear.

Peters's thesis is simple enough. She claims that a significant proportion of the Arabs living in the part of Palestine that became Israel in 1947 had only recently settled there, were in fact attracted by the economic opportunities afforded by Zionist settlement and so were not inhabitants from time immemorial. Hence, so Peters argues, the Jewish immigrants had just as much, if not more, right to the territory. Peters's second major claim is that nearly a third of the Arab refugees in 1948 had only recently come from the West Bank and the Gaza Strip. All this adds up to a rehash of the old Zionist proposition, neatly put by Israel Zangwill ninety years ago, that the Zionist settlers were a people without land, claiming a land without people.

One person who took the trouble to read Peters closely and check her use of sources was Norman Finkelstein, late of the Ecole Pratique des Hautes Etudes in Paris, who is at Princeton University working on his doctoral dissertation on aspects of Zionism. In its issue for September 5-11, *In These Times* published his findings.

From Time Immemorial, Finkelstein writes, "is among the most spectacular frauds ever published on the Arab-Israeli conflict," adding that "in a field littered with crass

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propaganda, forgeries and fakes, this is no mean distinction." He demonstrates with a wealth of detail that the evidence Peters musters to prove massive illegal Arab immigration during the years of the British mandate (1920-47) is "almost entirely falsified" and that her demographic study of population shifts within Palestine is "a transparent and vulgar hoax."

On the first point Peters suggests that the number of non-indigenous Arabs—illegal immigrants, that is—in the part of Palestine that became Israel amounted to somewhere between 200,000 and 400,000 by 1947, fully one-half of the Arab population. But to arrive at this statistic she has to confront the findings of three major authorities: the 1930 Hope Simpson report, the 1937 Peel commission report and the 1945-46 Anglo-American *Survey of Palestine*, as well as annual British reports to the League of Nations. Despite her show of far-ranging erudition, Peters mainly relies on those documents. Yet they all conclude, in the words of the *Survey*, "Arab immigration for the purposes of settlement [in Palestine] was insubstantial."

Peters gets around this by selective quotation, manipulation and misrepresentation of data, and by speculative inference with no foundation in fact. Take three of Finkelstein's examples (with his emphasis added). The Anglo-American *Survey* says, "As a matter of emergency, official arrangements were made, in October 1942, to bring laborers from Syria and the Lebanon under the auspices of the Army. . . . Under this arrangement *3,800* laborers were admitted." Peters uses this to write, "What the official Anglo-American Survey of 1945-46 definitely disclosed . . . is that . . . tens of thousands of 'Arab illegal immigrants' [were] *recorded* as having been 'brought' into . . . Palestine." Thus in Peters, imported laborers become illegal immigrants, and 3,800 becomes tens of thousands.

The *Survey* also says, "The 'boom' conditions in Palestine in the years 1934-36 led to an inward movement in Palestine particularly from Syria. The depression due to the state of public disorder during 1936-39 led to the return of these people and also a substantial outward movement of Palestinian Arabs who thought it prudent to live for a time in the Lebanon and Syria." Peters quotes only the first of these two sentences. The Peel commission report says, "According to an authoritative estimate, as many as 10 or 11 thousand Hauranis [from Syria] may go to Palestine *temporarily* in search of work in a really bad year." Peters converts this into "The number of Hauranis who illegally immigrated was 'authoritatively estimated' at 10,000–11,000 during a 'bad' year in the Hauran."

Finkelstein notes that Peters will often mangle a quotation in the text and give it correctly in the footnotes, thus permitting her to deny any misrepresentation. Peters never explicitly states the percentage of the Arab population in Jewish-settled areas of Palestine she deems not to have been indigenous. Followers of Meir Kahane will no doubt use Peters (though they claim an authority more divine than even her) to say "all." Peters's demographic thesis, mystifyingly endorsed by Prof. Philip Hauser, former director of the U.S. Bureau of the Census, is even more meretricious. Finkelstein shows that her arbitrary and misleading demographic divisions of Palestine obscure the fact that the bulk of her supposed 170,000 immigrants from the West Bank and Gaza actually came from Western Galilee and were thus "indigenous."

The historical and demographic manipulations served up by Peters to her eager consumers have long been dismissed by serious scholars in Israel. The denial of the reality of the Palestinians is nothing new. But her fakery will no doubt have a long half-life in America, nourished in the racist soil that has produced Leon Uris's *The Haj* and a Democratic nominee who has judged it expedient to return political contributions from Arab-Americans.

From My Mailbag

"Dear Cockburn: Did you see where the Bulgarian secret police got Truman Capote? Who else could it have been? There was no motive, no opportunity, no evidence of their involvement. . . . All the earmarks of a Bulgarian job, as e.g. the Reichstag fire . . . "

I agree the evidence against the Bulgarians in the Capote affair is overwhelming. We must await a definitive account by Claire Sterling, just as soon as she recovers her composure after receiving a tumultuous spanking from Michael Dobbs, Paris correspondent for *The Washington Post*. Dobbs had noted serious deficiencies in Sterling's account of Italian prosecutor Antonio Albano's case against the wretched Antonov and his fellow Bulgars.

Got a Frog in Your Pocket?

§"How Reagan Seduced Us" was the *Village Voice* headline above an article about White House manipulation of the press. *Us*?

§ In which of these periodicals (*The New Republic*, *Commentary*, *The New Leader* or *The Village Voice*) did the following words occur: "Kirkpatrick was right to make clear that the dilemma America must avoid is isolation through loss of allies and international regard . . . where Kirkpatrick scored again and again was in branding the Carter administration with failure of courage and a refusal to look at the world in realistic terms." Clue: "Us" was probably the right word after all.

§ Did you know that Christ was a trick horseman? Although the Authorized Version masks it, the story of the Passion in the original Greek says that as Christ entered Jerusalem, "They brought the ass, and the colt, and put their clothes on them and set him on them." Ask Archbishop O'Connor about it, next time you see him.

§ *Screw* had a fine story about one porn star who was so afraid of flying that he could endure the journey from New York City to the West Coast only by pressing a pair of soiled panties to his nose for the duration of the trip.

§ Next week: From Burger Court to Burger King: Is there ground for a beef?

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ARTICLES.

OVERVIEW

Fifteen Years of The Burger Court

HERMAN SCHWARTZ

On the first Monday in October 1969, fifteen years ago, Warren Burger started his first term as Chief Justice of the United States. Fifteen years is a long time, especially since these have been years of intense judicial activism; the Warren Court's active years were much fewer.

Chief Justice Burger took office as an outspoken critic of the Warren Court; the previous November Richard Nixon had been elected President, after a campaign in which he lambasted the liberalism of the Warren Court; five months before Burger was named, Justice Abe Fortas was forced off the Court; the nation was in the midst of a virulent white backlash. In just three years Justices Potter Stewart and Byron White, who hadn't much liked what the Warren Court had been doing, would be joined by three Nixon appointees, all selected for their conservatism. It looked as if the Court's *Thermidor* reaction were about to occur.

But it hasn't, at least not yet. As our essays indicate, the overall record of the Court in many areas has been surprisingly sympathetic to individual rights. With some important exceptions, highlighted by Haywood Burns and by Wendy W. Williams and Judith L. Lichtman, the Court's decisions on racial and sexual equality and abortion have been humane and helpful.

The Court also has protected basic rights to health care, education, welfare and food, under a variety of theories, while insisting firmly that it was not recognizing these as fundamental rights.

In other areas, however, its performance has consistently reflected what the late Edmond Cahn called "the imperial perspective": what the government wants, the government gets, because it is the government. In the 1980 case *Snepp v. United States*, as Morton Halperin points out, the Court did not even bother hearing arguments or reading briefs before giving the government broad authority to control disclosures by former Central Intelligence Agency employees. In *Regan v. Wald* this spring, the Court allowed the President to bar travel to Cuba, despite a 1977 law clearly intended to deny him that power. Burt Neuborne documents the persistence with which Chief Justice Burger, Justice William Rehnquist and their allies have tried to shut the courthouse doors—but only to those seeking to enforce constitutional rights. When those same Justices want to promote nuclear development, for example, "standing" and other courthouse-closing concepts become flexible indeed.

Sidney Zion finds a similar double standard at work in the decisions on libel. Zion, a former reporter, focuses on three emblematic cases to demonstrate that while the Court takes a tolerant view of defamatory speech or wrongful arrests by local law-enforcement authorities, it holds the press to ever-tougher standards in libel suits, at the expense of the First Amendment.

As Alan B. Morrison shows, the Court has expanded judicial review of administrative rulings, but it has almost unvaryingly supported governmental and other efforts to withhold information from the public by narrowly construing the Freedom of Information Act.

Some of those F.O.I.A. decisions were nullified by Congressional action, which brings us to another interesting development of the past fifteen years. The Courts have traditionally been considered the primary guarantors of our liberties, but in the Burger era, Congress has often proved the more sympathetic branch of government. It not only reversed the narrow F.O.I.A. constructions; in 1979 it passed legislation negating a ludicrous ruling that the exclusion of pregnancy-related disabilities from a comprehensive benefit program did not discriminate against women, and in 1980 it overruled a decision allowing newsroom searches. The Voting Rights Act extension in 1982 implicitly expressed disapproval of a Supreme Court decision two years earlier, in *Mobile v. Bolden*, requiring proof of intent to discriminate in a voting-rights suit. As Williams and Lichtman suggest, it may be that "social reform [will] again be the province of legislatures."

The Court's labor decisions go in many different directions, but as Arthur Fox points out, by and large the employer has come out on top, unions second and the individual worker a distant third. And as Jerry S. Cohen and Herbert E. Milstein report, in antitrust and securities cases the Court has become more and more a defendants' court, after issuing some antitrust decisions significantly extending competition to professions and municipalities.

It is the trends in certain recent cases, however, that are most worrisome. Yale Kamisar points out that although there was something of a liberalizing trend in criminal procedure from 1977 through 1981, in the last few years the Court has made a sharp shift to the prosecution's side. In death penalty cases, the majority had seemed to be striving to safeguard fair procedures for imposing the death sentence, though categorically refusing to abolish it, but in the last two years, as Michael Meltsner shows, the Court has begun to insist that executions be carried out. To this end it has curtailed habeas corpus petitions and other procedural protections, and the Chief Justice has expressed his irritation at defense lawyers who attempt to win stays for their clients on death row. Finally, Norman Redlich shows that after several decisions recognizing the importance of the separation of church and state, the Court majority has begun to back away from this principle. In 1981 it required

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state-supported colleges to provide campus facilities for student religious groups, even if they wanted to use them to pray; in 1983 it upheld Minnesota's tuition tax credits; and in 1984 it upheld the city of Pawtucket, Rhode Island's right to place a Nativity scene in front of the City Hall.

The recent moves toward conservatism obviously coincide with the advent of the Reagan Administration and its extensive and persistent campaign against individual liberties. Some of the rights under attack, for example, gender equality and freedom of choice on abortion, were created by the Burger Court, and the plethora of recent regressive decisions may be only a transitory response to certain cases before it rather than a fundamental shift. Even the past term saw some commendable decisions, such as those denying the United States Jaycees the right to exclude women and affirming an appellate court's obligation to review libel judgments very closely. There were also rulings favorable to public interest lawyers seeking attorney's fees, to interracial adoption, to women denied law firm partnerships and to handicapped children. In the previous term, the Court also rebuffed a major effort to undo its abortion decisions.

Nevertheless, the recent decisions hostile to individual liberties may well signal more than a passing phase. Several cases involving prisoners provide a barometer of the Court's mood. In the early 1970s the Federal courts abandoned their earlier hands-off attitude toward the abominable conditions in American prisons. The Burger Court issued a few rulings that facilitated prisoners' rights suits and a major decision on the right of parolees to fair procedures in revocation hearings. The lower courts began to issue far-reaching orders requiring major improvements in penal institutions, which the Supreme Court left undisturbed.

In 1974, however, the Court began to cut back, allowing only minimal procedural protection in disciplinary proceedings and permitting correction officials to deny convicts access to the press. Five years later, in *Bell v. Wolfish*, a case involving a new pretrial detention center in New York City, Rehnquist led the Court in denying certain basic rights to pretrial detainees and to those who are held because they cannot afford bail. In the next few years, the Court rebuffed challenges to prison overcrowding and other harsh conditions. All those holdings could be limited to the facts of the cases, however, and many lower courts continued to hand down broad orders for improvements in correctional institutions.

In July the Court decided two more prison cases and this time the message to the lower courts was loud and clear: Defer to the administrators. In one case a lower court had ordered the Los Angeles sheriff to allow pretrial detainees who had been held longer than a month to embrace members of their family, provided there was no security risk, no chance that drugs would be passed and no substantial expense—the ostensible reasons for the rule prohibiting contact visits. In a sweeping opinion by Burger (who advocates prison reform in speeches at dinners and bar association meetings) the Supreme Court reversed. Leave the prison administrators alone, Burger told the lower courts, even if the result would be further deterioration of the prisons. In another case, the Court, again in an opinion by Burger, allowed random searches of cells, declaring that prisoners have no right to privacy.

Those rulings alone do not stamp this as a reactionary Court. But a trend is discernible when they are taken in conjunction with other recent decisions, limiting the procedural rights of the accused; reaching out to disapprove goals and timetables to remedy hiring discrimination in a case that did not involve hiring [see editorial, "Negative Action," *The Nation*, June 30]; and condoning state financial support for religion. Its direction is away from concern for individual liberties and toward the imperial perspective that says, Don't question authority.

The shift may be the result of the replacement of the moderately conservative Justice Potter Stewart with the rigidly ideological Justice Sandra Day O'Connor, who in 1982-83 voted with Rehnquist 86 percent of the time. The future composition of the Supreme Court should be an issue in this election, but Walter Mondale has not emphasized it. That may well be sensible politics, for though there may be some voters who are worried about church-state issues under a Reagan-packed Court, most voters probably are not sympathetic to civil rights and civil liberties anymore. As many of our contributors note, if Ronald Reagan makes a few more appointments (Federal court Judges Robert Bork and Richard Posner, who are even more doctrinaire than

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O'Connor, are likely candidates) the Supreme Court will become largely irrelevant to achieving a just society, and perhaps an obstacle.

Ten years after Warren Burger became Chief Justice, I wrote in these pages that "this Court may indeed be like Churchill's much-scorned pudding, without a theme" [see "The Burger Court Holds the Line," November 17, 1979]. I wondered, however, "Is that so bad, at a time when the theme set by the other branches of Government and the not-so-silent majority often seems so hostile to human rights?" Now that a theme seems to be emerging, we may become nostalgic for those pudding years. □

RACIAL EQUALITY

The Activism Is Not Affirmative

HAYWOOD BURNS

One day in the summer of 1968 I stood on the steps of the United States Supreme Court building and watched as throngs of people advanced from the valley below. They were part of the encampment on the Washington Monument grounds known as Resurrection City—a conglomeration of tents, wooden shacks and lean-tos that were temporary homes for representatives of the Poor People's Campaign, the Rev. Martin Luther King Jr.'s last major project. King was dead. Robert Kennedy's assassination was but a few weeks old. At 28 I had inherited the position of chief legal counsel for the campaign.

Looking out at the approaching mass of Native Americans in full headdress and regalia, at Southern blacks wearing bib overalls and full Afros, at muscled, mustachioed Chicanos from the Southwest, at gaunt, pinched-faced whites from Appalachia, at sprinklings of Asian and Pacific peoples, I knew there was nothing in my Yale Law School training that had prepared me to deal with this situation. The people were angered by a recent Court decision that had undermined the treaty rights of Native Americans, and they had come to register their grievance. As I watched them near the steps, my peripheral vision took in hundreds of D.C.'s finest, truncheons ready. When I rushed forward to advise King's successor, the Rev. Ralph Abernathy, and my other clients of their legal rights, I heard behind me a loud rumbling sound, and turned in amazement to witness the massive bronze doors of the Court tremble and groan as they slowly closed, and then banged shut.

In retrospect that scene has become terribly emblematic, a foreshadowing of the Burger Court's response to racial minorities and poor people who come to it seeking justice.

The counterrevolution predicted by many has yet to occur, at least in the form expected. While the Burger Court has not gone so far as to revoke the Thirteenth Amendment, it has drastically reduced civil rights litigants' access to the courts. Through recasting procedural devices and erecting technical barriers, usually without specific reference to race, it has placed obstacles in the way of those who turn to the legal system to redress racial wrongs. To be sure, nonwhites are not the only ones touched by these rulings; political dissidents and the dispossessed have also been affected. But the major impact of diminished access has been on racial minorities, who, in the Warren years, looked to the Supreme Court for protection and vindication.

Specifically, the Burger Court has set more stringent criteria for determining "standing" in civil rights cases—that is, who has a sufficient interest in the case to be permitted to bring it before the Court—than its predecessor did. This narrower view of standing means that fewer cases reach adjudication on the merits. By the same token, the Court has taken a much more restricted view of class actions and what constitutes a class for purposes of bringing a suit on behalf of persons similarly situated. Thus it has become more difficult for members of a group to put forth their claims under the umbrella of a single lawsuit. They are left with piecemeal justice through multiple litigation, which, given the paucity of most such plaintiffs' resources, means no justice at all.

The ability of victims of discrimination to sue the state has been further reduced by the Burger Court's doctrines of sovereign, judicial and prosecutorial immunity. Just as an increasingly conservative post-Civil War Supreme Court interpreted the Civil War amendments and the postwar civil rights statutes so narrowly as to dilute their strength and effectiveness, the Burger Court has, through interpretation and fiat, stripped from the hands of legal advocates fighting for racial justice the legal tools for their advocacy.

Even where access can be obtained by alleging violation of civil rights "under color of law," the Burger Court has made it more difficult to obtain full relief in racial cases, both by limiting the scope of the remedies available in Federal courts and by imposing a more onerous burden of proof on plaintiffs. In the first instance, it has curtailed the powers of Federal judges to fashion what they deem to be adequate and appropriate remedial measures upon a finding of discrimination. In the second, it has held that plaintiffs may not simply demonstrate that harmful discrimination has occurred; they must also prove that there was an intention to discriminate.

Of course, to speak of the Burger Court as a monolithic tribunal which reacts with predictable philosophic single-mindedness is too simplistic. There are gradations and shadings of views among the Justices which result in shifting combinations of votes on the various issues that come before them. There is no unalterable alignment of "pro-civil rights" and "anti-civil rights" Justices, though some seem consistently to be more one way than the other.

Nevertheless, certain patterns and trends are visible. There really is a "Burger Court" in the sense that its dominant tone has been set by the Chief Justice, a hard core of

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his fellow Nixon appointees and Reagan appointee Sandra Day O'Connor. It is also accurate to say that over the past fifteen years this tone has been one of conservatism or reaction on civil rights and civil liberties issues.

Some of the decisions that have had a disproportionately negative impact on racial minorities ostensibly had nothing to do with race. Considering the nation's racist legacy, however, its ongoing bigotry and its inequitable social and economic structure, it is not surprising that decisions that strike against the impoverished, the criminally accused or the incarcerated have had a disproportionately negative impact on blacks, Hispanics and Native Americans. In rejecting the pleas of the poor for equitable school financing, of suspects for time-honored constitutional guarantees, and of prisoners for recognition of their basic needs, including life itself, the Supreme Court has had an awesomely detrimental impact on the nation's nonwhite communities.

In general, where questions of race were explicitly at stake, the Court has proceeded more cautiously. Its record in these cases is more subtle and also more complicated. For the Warren Court, *Brown v. Board of Education* (1954) was the zenith of its civil rights decision-making, at once a watershed opinion on education and a historic line of demarcation between an older, Jim Crow America and a newer, desegregating one. Although the Burger Court has often failed to move forward in complete harmony with the spirit of *Brown*, it has systematically opposed segregation as the result of past official educational policies.

In the 1971 case *Swann v. Charlotte-Mecklenburg Board of Education*, the Court affirmed a lower court's ruling striking down Charlotte, North Carolina's neighborhood school policy and ordered a change of school zones and pupil transportation to achieve a racial mix throughout the district. The opinion was written by Chief Justice Warren Burger. It was the Burger Court's first major school desegregation decision and its last unanimous one.

As the litigation moved into Northern school districts, the lines between de jure and de facto segregation began to blur, and the question of how far the Court was prepared to go in unearthing past official discrimination became a source of disagreement, as did the question of how far it was willing to go in fashioning remedies for school segregation.

In 1973 in *Keyes v. Denver School District No. 1*, the Court was faced with a defendant that had never legally ordained school segregation. Nonetheless, a majority of the Court found for the plaintiffs, noting that though there may not have been statutory segregation, it was clear that the school board was responsible for segregation throughout the school district because of its placement of schools and drawing of district lines. Of the Nixon appointees, only Justice Harry Blackmun joined the majority opinion. Burger concurred in the results, Justice Lewis Powell dissented in part and concurred in part and Justice William Rehnquist dissented. The Court's unity on school desegregation began to disintegrate as philosophical differences began to surface.

Keyes highlighted the issue of the way in which de jure and de facto segregation should be defined. The Court was agreed that intentional segregation was unlawful. But how remote and indirect could the evidence establishing official intent be? Further, the case focused on the question of remedy. If the Court finds unequal education in one part of a system, should it order that the whole system be revamped? The majority in *Keyes* said the entire Denver school system would have to be desegregated unless the city could accomplish the almost impossible task of demonstrating that education in the rest of the system had not been influenced by the segregation found to exist in part of it.

Tensions within the Court came to a head in 1974, with *Milliken v. Bradley*, a case involving the Detroit school system. It seemed irrefutable that white flight to the suburbs was largely responsible for the segregated character of the Detroit public schools and that a Detroit-only remedy would be futile. Nonetheless, the Court balked at the trial court's metropolitan desegregation plan, which had been approved by the Court of Appeals and which included the suburbs. Chief Justice Burger, writing for a 5-to-4 majority, reasoned that since the suburban communities had not been involved in intentional segregation, they should not be required to participate in an areawide solution. In the *Milliken* opinion the Court betrayed its bias in favor of local control of schools. Just how far the Court will be willing to carry that bias in the face of increasingly segregated inner-city school systems remains to be seen. The effect of *Milliken* so far has been to encourage segregation in metropolitan areas, not just in education but also in housing.

The Court, while not openly trying to reinstate the separate-but-equal doctrine set down in *Plessy v. Ferguson* (1896), is far less active and aggressive on the question of civil rights than the Warren Court. It has been especially conservative on what constitutes intentional segregation, grossly unimaginative in reaching out and fashioning solutions for racial discrimination and much too deferential to local decision-making where the rights of racial minorities are concerned. This Court would not have attempted to reverse the tide of legal history by upholding Jackson, Mississippi's right to have segregated swimming facilities, in *Palmer v. Thompson* (1971), but it finds nothing constitutionally objectionable in the city's decision to close down all the pools rather than integrate them.

Although the discriminatory intent behind Jackson's action in closing the pools did not seem to bother the Court in *Palmer*, the unifying principle of its decisions in a goodly number of civil rights cases is that the Constitution is not offended by invidious racial treatment unless there is an intention to discriminate.

If there is a statute that the Court feels will permit it to grant relief from discrimination, once it has been shown to exist, it may do so. In *Griggs v. Duke Power Company* (1971), the Court, relying on Title VII of the Civil Rights Act of 1964, invalidated an examination that the company had administered to employees who were being considered for promotion. Writing for the majority, Chief Justice Burger explained that the test was not related to the job in question and its administration had effectively excluded black workers from that job category. Five years later, in

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Washington v. Davis, however, the same Court upheld the Washington, D.C., police force entrance exam in the face of a constitutional challenge, ruling that no intent to discriminate had been proved, even though a disproportionate number of black applicants failed the test. The black applicants who brought the suit had no Federal statute on which to rely, since the Civil Rights Act of 1964 was not applicable to government employees at the time.

On April 22, 1980, in *Rome v. United States*, the Court held that a proposed annexation in Rome, Georgia, which would have diluted black voting strength, violated the Voting Rights Act of 1965, even though there was no proof of a discriminatory intent. That same day, in *Mobile v. Bolden*, the Court refused to strike down Mobile, Alabama's system of at-large elections which had been challenged under the Fifteenth Amendment, stating there was no proof of intent to reduce black people's political power.

The pattern of these decisions indicates that the Court will generally grant relief when a discriminatory racial impact can be shown to violate the law. When cases rely on the Fourteenth Amendment's guarantee of equal protection under the law or the Fifteenth Amendment's protection of the right to vote, however, the Court will require proof of a specific intent to discriminate.

The stringency of the Burger Court's intent requirement often makes it very difficult to prove discrimination. Surely a less rigid and less formidable approach to proving discrimination could have been developed even if the intent requirement were retained. Another Court might have taken at least some of the burden off the minority plaintiffs, once a disparate impact was shown, and demanded that the alleged discriminators show they were not, in fact, discriminating. After all, the latter have the best access to the evidence.

During its tenure the Court has had to devise the legal standards against which to measure efforts to redress injuries suffered by an entire group of people; this has presented the Justices with one of their most vexing problems. A central issue in American life continues to be how white people will respond to the historic wrongs visited on Americans of African descent. As in the past, with *Dred Scott v. Sandford*, with *Plessy* and *Brown*, the nation has turned to its courts for resolution of raging racial debates. The answers have come back somewhat garbled, but the direction appears obvious for those who had hoped that the legal system responsible for much of their degradation might have the capacity to repair some of the damage. Much of their hope had rested on affirmative action programs.

The case of *Bakke v. Regents of the University of California* in 1978 presented the Court with one of its first major opportunities to make a clear statement on these programs. The University of California Medical School at Davis had set aside sixteen places for minority students under a special admissions program. A white student, Alan Bakke, chal-

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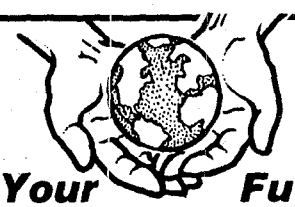
lenged the program after being denied admission. Those on both sides of the question had hoped the *Bakke* case would provide definitive legal guidance. That hope, however, was a vain one, for the Court ended up speaking in many tongues. With four Justices upholding the plan, four opposed and Powell somewhere in the middle, it turned out to be something of a 4½-to-4½ decision. Powell's view was that on the one hand, it was permissible for Davis to take race into account in shaping its admissions policy, while, on the other, the school could not lawfully maintain its admissions quotas based on race. *Bakke* ended up being decidedly unhelpful in resolving the dilemma, except to the extent that it provided insight into the attitudes of the individual Justices toward affirmative action.

The issue was pressed further and presented in a somewhat different light the following year in *United Steelworkers of America v. Weber*. Brian Weber, a white worker, challenged a job-training program designed to accommodate blacks and whites in equal numbers until the proportion of black workers at the plant was equal to that in the local labor force. When he was not accepted for the program, Weber attacked it as a racial quota system in violation of Title VII of the Civil Rights Act of 1964. Five Justices disagreed, pointing out that the plan was a private agreement entered into by the employer and the union; it was of limited scope and duration, was remedial in character and sought to correct the great racial imbalance in this particular workplace. The majority stated that the arrangement was consistent with the legislative intent of Title VII. Burger and Rehnquist dissented. Powell and Stevens did not participate, Blackmun being the only Nixon appointee to side with the majority.

The Public Works Employment Act of 1977 declared that at least 10 percent of Federal funds for public works projects must be used to procure the services of business enterprises run by members of minority groups. In 1980, in *Fullilove v. Klutznick*, the Supreme Court addressed the constitutionality of the 10 percent minority set-asides and upheld the statute, 6 to 3. There was no majority opinion. The Chief Justice wrote one opinion, which Justices Powell and White joined. In their view, Congress could take such action using racial criteria upon making a judgment that it was necessary as a remedial measure, especially where, as there, it was limited, properly tailored and did not impose too great a burden on "innocent" parties. In the view of Justices Marshall, Brennan and Blackmun, the law passed constitutional muster because of the substantial government interest in overcoming past discrimination and providing opportunity within the society across racial lines. Justices Rehnquist, Stevens and Stewart dissented.

Although a clear pattern of decision-making on affirmative action is not easy to discern, it does appear that if Congress has recognized a need for remedial action by an appropriate official agency and has passed a law, or if the claimants are direct victims of racial discrimination, a majority of the Court will support the affirmative action. Similarly, cer-



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tain voluntary, private arrangements will win approval by a narrow majority.

The decisions in this area do not, however, give any assurance that a majority of the Court is in tune with a philosophy that would generally provide group remedies for group wrongs. With the exception of Justices Marshall and Brennan, and sometimes Blackmun, there appears to be far too little appreciation of the historic injury done to nonwhites and to women in this society, or of the persistence of institutional and structural racism. Too little weight is accorded to the vital interest a supposedly modern, democratic, pluralistic state has in doing simple justice for its racial minorities. Too much weight is given to the putative interests of so-called innocent parties. Although it is proper for the Court to show concern for all affected parties, it is difficult to see how even the most ordinary and inoffensive white workers, who often got their jobs as a result of a biased job market, are entirely innocent. Although they are not directly responsible for the favoritism built into the system, they directly benefit from it.

The canons of interpretation by which affirmative action issues will be decided are still being molded in the crucible of the High Court, but the extent to which this Court is prepared to allow the interests of racial minorities to give way to other competing interests was sadly revealed in the recent decision in *Firefighters Union Local 1784 v. Stotts*. A 6-to-3 majority struck down a court order designed to prevent the layoff of black firefighters hired under a court-approved affirmative action plan, in favor of a pre-existing seniority system. In a head-on clash between the seniority system of a workplace with a history of gross racial exclusion and an affirmative action plan designed to correct that injustice, the seniority system won easily. The message was loud and clear: black job rights take low priority.

It is hoped that the *Stotts* case is not a fire bell in the night, warning of an even more radical and abrupt reversal of the Court's role as vindicator of civil rights. Coming as it does, however, when the Court's drift to the right in other areas has suddenly become a surge, it does not augur well.

To date, it cannot fairly be said that the Burger Court has launched a full-scale, frontal attack on the civil rights gains under the Warren Court. That is unlikely to occur. So conservative an institution, even when it is up to no good, traditionally does not move in such a manner. The ground lost during the Burger Court's reign has been through erosion—through tinkering with procedural devices, cutting off access, constricting remedy. Even where no direct racial animus is revealed, the Court's narrowness of vision and its lack of social sensitivity and of commitment to racial justice have prevented it from playing a more constructive role in providing justice to the nation's racial minorities.

Added to its conservative predilections on racial issues are the urgings of an Administration and Justice Department that unashamedly seek to turn back the civil rights clock. Until now the Burger Court has demonstrated a measure of independence. Its resolve may be weakening, and will be in even greater jeopardy if the political climate grows more reactionary after the November election and if President Reagan gets the opportunity to put his stamp on the Court. □

PROCEDURAL MATTERS

Taking Away The Right to Sue

BURT NEUBORNE

I learned in seventh-grade civics that if a government official violates someone's constitutional right, a judge should either make him stop or make him pay. As seventh-grade views of the world go, that one wasn't bad. In the real world, though, rights, even if broadly defined, are not self-enforcing. The work of translating an abstract right into a concrete reality capable of affecting peoples' lives depends on the existence of an effective enforcement apparatus. During the fifteen years of Chief Justice Warren Burger's Court, we have witnessed a sustained assault on that enforcement apparatus. Even if the Burger Court had left the substantive rights legacy of its predecessor intact (which, as the most recent term strikingly demonstrated, it has not), its decisions on procedure would still have created an obstacle course often making it difficult—if not impossible—to enforce those rights that are left us.

Successful enforcement of constitutional rights through the courts hinges on four questions: Who can sue to enforce a constitutional right? Who can be sued for violating a constitutional right? What kind of relief can be obtained? Where can one sue?

The Court under Chief Justice Earl Warren had a simple answer to those questions: almost anyone who believed his or her constitutional rights had been violated could take almost any government official to the most convenient court and seek effective relief by making him stop or making him pay.

The Burger Court's answer is far different. In fifteen years, it has denied whole categories of Americans access to courts; it has insulated much of the government from responsibility for even bad-faith violations of the Constitution; it has limited the use of Federal courts as forums to enforce constitutional rights; and it has severely cut back on a judge's power to grant effective relief in constitutional cases. My seventh-grade civics teacher wouldn't recognize the process anymore.

The Burger Court began by redefining the answer to the question of who can sue to enforce a constitutional right. During the Warren years, the Court held that taxpayers possessed "standing" to challenge government programs that violated the First Amendment ban on establishing religion, and that voters had standing to challenge malapportioned state legislatures. By 1970, the Supreme Court had laid

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down flexible guidelines that permitted virtually anyone with a plausible argument that he or she was adversely affected by an illegal official act to seek judicial assistance in enforcing the Constitution.

The Burger Court quickly and dramatically curtailed the number of plaintiffs eligible to sue, under the guise of redefining standing. In 1972 it dismissed challenges to military surveillance of constitutionally protected political activity, in *Laird v. Tatum*. Two years later, in *United States v. Richardson*, it refused to consider whether Congress was shirking its constitutional obligation in failing to demand a detailed budget from the Central Intelligence Agency. In each case, the Court ruled that the plaintiffs (who were, respectively, targets of unlawful military surveillance and voters unable to determine even the vaguest contours of the C.I.A.'s budget) had failed to demonstrate a sufficiently substantial "particularized" injury and thus lacked standing to challenge unconstitutional activity.

Having made it almost impossible to use the courts to oversee military intelligence and the C.I.A., the Burger Court moved on to other areas of American life. In *Warth v. Seldin* (1976) black residents of Rochester who had hoped to live in integrated and decent housing in the city's suburbs were denied standing to challenge exclusionary zoning which blocked the building of multiple dwellings in comfortable upper-class enclaves. That same year, in *Simon v. Eastern Kentucky Welfare Rights Organization*, poor residents of Appalachia, who desperately needed basic health care, were denied standing to challenge the Nixon Administration's insistence on granting favorable tax status to private hospitals that refused to serve the impoverished.

In each case, the majority justified slamming the door to the courts on the poor and the weak with the argument that barring the illegal activity (unconstitutional zoning and unlawful tax benefits) would not *necessarily* have resulted in new housing or better health care. Following that line of reasoning, the Court could have refused to decide *Brown v. Board of Education* since, as we have learned from bitter experience, the nullification of segregation laws does not by itself result in integrated schools. Chief Justice Warren didn't ask whether the Court's decision would cure the social problem at hand. He asked merely, Is illegal government activity part of the problem? For Burger's Court, that's not enough.

Three recent decisions illustrate how far we've fallen in fifteen years. The first, *City of Los Angeles v. Lyons* (1983), dealt with alleged police brutality. The Los Angeles Police Department utilizes a choke hold that can be, and has been, fatal. After a black resident of Los Angeles had been strangled to within a breath of his life by a police officer investigating a traffic accident, he sued to require the issuance of guidelines that would forbid the use of deadly force in situations where the safety of an officer is not threatened. The lower courts agreed and ordered the guidelines issued. The Burger Court reversed those rulings, holding that although the plaintiff had been choked almost to death, he had no particular reason to be worried about future chokings and thus had no standing to seek an order prohibiting them. Under the Burger Court's analysis, the only person qualified to seek an order to stop the strangleholds would be a person who is being choked.

In a second case, *Allen v. Wright* (1984), the Burger Court caved in to the Reagan Administration's desire to grant tax benefits to segregated private schools. Last year the President's attempt to grant tax-deductible status to such schools touched off a national furor which culminated in a highly publicized decision, *Bob Jones University v. United States*, rebuffing the Administration. What the Burger Court gave with one hand, however, it quickly took back with the other. In *Allen* it ruled that black parents whose children attend segregated public schools lack standing to attack the failure of the Internal Revenue Service to withdraw the tax-deductible status of private segregated schools, which are draining white children from the public schools.

The two cases involving tax benefits for segregated private schools present a classic example of what the Burger Court has done to restrict citizen access to the courts. In *Bob Jones* the Court announced, amid great fanfare, the citizens' right not to have their tax dollars support segregated schools. In *Allen* it quietly wiped out the ability of the courts to back up that right by denying standing to anyone who sued to enforce it.

Lest anyone think that the Chief Justice is taking a principled view of standing, consider his performance when his political views are threatened. When the nuclear power industry's ability to attract investors was jeopardized by fears on Wall Street about the enormous number of damage suits likely in the event of a nuclear accident, Congress stepped in and imposed an artificially low ceiling on a company's liability. The statute was promptly challenged by people living in the vicinity of a proposed nuclear plant and was declared unconstitutional by James McMillan, a respected Federal judge. When the case, *Duke Power Co. v. Carolina Environmental Study Group*, was appealed to the Supreme Court in 1978, Burger was faced with a dilemma. If he adhered to the principle the Court had established in the civil rights suits and applied the narrow standing doctrine, he would have to dismiss the suit. But that action would leave the constitutionality of the liability ceiling in doubt, making it impossible for bond lawyers to assure jittery investors of the ceiling's ultimate effectiveness.

The Chief Justice didn't flinch. He ruled that the plaintiffs had standing to challenge the liability ceiling because they might suffer environmental injury if the plant was built, and that in the absence of the liability ceiling, it might prove impossible to borrow the money to build the plant. Beware of Warren Burger bearing gifts. Having granted standing under this Rube Goldberg analysis, he promptly reversed the lower court on the merits of the case, thus removing the impediment to financing nuclear power plants.

In Chief Justice Burger's world, inner-city blacks don't have standing to challenge exclusionary zoning; black parents don't have standing to challenge tax benefits to seg-

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regated private schools which rob their children of a chance for an integrated education; and impoverished people don't have standing to challenge illegal tax breaks to hospitals that refuse to serve the poor. But homeowners have standing to launch a doomed challenge to a law that is extremely unlikely to affect them, just because Chief Justice Burger wants to be sure the statute is upheld.

The Burger years have also seen a dramatic change in the answer to the question, Who can be sued? During the Warren era, with the conspicuous exception of judges, who have always been immune from damages, public officials were considered liable for the harm they caused if they violated a constitutional right. In the fifteen years of Burger's stewardship, the Supreme Court has not only explicitly reasserted the absolute immunity of judges from a damage action (in *Stump v. Sparkman* of 1978, a case where the judge knowingly ordered a young woman sterilized without authority to do so) but has expanded absolute immunity to Presidents (Guess which one—that's right, Richard Nixon) charged with bad-faith violations of the Constitution; to prosecutors charged with knowingly withholding evidence; to police officers charged with perjury; to naval officers charged with practicing racial discrimination against subordinates; and to legislators charged with knowingly abusing their power. If the President, a judge, an administrative-hearing officer, a zoning board, a prosecutor, a police witness, a state legislator or a military superior knowingly and willfully violates your constitutional rights, don't go to Warren Burger's door asking for damages. As far as he's concerned, they're untouchable.

Even those officials who can still be sued have been rendered virtually immune from having to pay damages by the expansion of the "good faith" defense. Thus, if an official violates the Constitution and injures you—by conducting an illegal wiretap, for example, or by expelling your child from school for publishing a newspaper—he or she may get off scot-free if the law wasn't absolutely crystal clear when the act was committed. In the Burger Court's view, an official should not be deterred from performing an act just because it might be unconstitutional.

In fact, if a local official violates clearly established state law and the Constitution, the Burger Court grants a good-faith immunity from damage suits even if the official knew he or she was violating state law. The Court feels that officials are too hemmed in by rules and need more "breathing space."

The answer to the third question—What kind of relief can be sought?—has also changed dramatically in the last fifteen years. As mentioned, the immunity decisions have made it much more difficult for injured parties to seek damages, and the Burger Court has also moved to narrow a judge's power to grant injunctive relief. In case after case, the Burger Court has warned judges to avoid issuing broad injunctions, even when those are necessary to enforce constitutional rights. For example, after a Federal judge in Philadelphia heard testimony concerning more than twenty instances of brutality by the city police, he ordered the police chief to institute effective procedures for stopping the practices; in *Rizzo v. Goode* (1976) the Burger Court reversed the requirement, admonishing the judge to refrain from interfering in the affairs of local government. Similarly, when a Federal judge presented with inhumane conditions in a school for retarded children ordered officials to comply with state law, the Burger Court overruled him, in *Penhurst State School v. Halderman* (1984), interpreting the Eleventh Amendment as forbidding Federal judges to enforce state laws against state officials.

For 200 years, Americans of every social class and political persuasion—from slaveholders seeking to enforce the fugitive slave clause to freedmen seeking to enforce the Thirteenth Amendment's prohibition of slavery, from corporations seeking to enforce substantive due process to civil rights plaintiffs seeking to enforce the Bill of Rights—have looked to the lower Federal courts as the principal enforcement arm of the Constitution. The historic preference for the Federal courts rests on the fact that more often than not, constitutional litigation involves a challenge to the majority. Federal judges are appointed for life and are as insulated from political pressure as it is possible for public officials to be. Most state judges, on the other hand, are either elected or closely linked to a political party. It should not be surprising, therefore, that over time an insulated forum like a Federal court has been more likely than a politically accountable one to enunciate and implement vigorous constitutional doctrine.

The most important procedural innovation of the Warren era was the Supreme Court's decision to permit litigants seeking the enforcement of constitutional rights against state and local officials to bring their cases to Federal court without first having to spend years exhausting state judicial remedies. Fifteen years of the Burger Court have severely eroded the Warren Court's model. Using a series of technical rubrics, the Burger Court has chipped away at Federal jurisdiction until whole categories of constitutional litigation are outside the purview of the Federal courts. Thus, if a teacher beats a child, a prison guard destroys a prisoner's family photographs, a state department of social services short-changes a welfare recipient, a local bar association tries to discipline a lawyer because of his or her political beliefs, a police chief falsely brands someone a thief, or a local district attorney decides to prosecute political radicals under a clearly unconstitutional statute, the cases are to be relegated to state court. It is true that state courts—especially those with a degree of institutional independence—have become increasingly sensitive to constitutional issues. Indeed, given the present drift of the Supreme Court, state courts will play an increasingly important role in preserving individual liberties. Access to Federal court, however, continues to be a critical enforcement mechanism for constitutional rights—a mechanism which remains under siege by the Burger Court.

Although the record of the last fifteen years is a bleak one, there are a few bright spots. In *Bivens v. Six Unknown Agents of the Federal Narcotics Bureau* (1971), the Court ruled that Federal officials are theoretically liable for

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damages if they violate the Constitution. Although in practice the expanded immunity doctrine often frustrates its enforcement, the basic principle of individual responsibility for unconstitutional acts now applies to officials at the local, state and Federal levels. Similarly, over Chief Justice Burger's opposition, the Court recognized that local governments should be liable for damages caused by their unconstitutional policies, regardless of whether an individual official is liable, in *Owen v. Independence* (1980).

Even with those occasional victories, however, fifteen years of erosion have transformed my seventh-grade civics model to the point where it looks more like a maze for laboratory rats than a blueprint for the effective enforcement of constitutional rights. □

CRIMINAL LAW

The Swing of The Pendulum

YALE KAMISAR

In the closing years of Earl Warren's tenure as Chief Justice of the United States, violence in the ghettos and disorder on the campuses, political assassinations and near-assassinations, ever-soaring crime statistics and widespread criticism of the Court combined, as my colleague Francis Allen has noted in the *University of Illinois Law Review*, "to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."

Many politicians were quick to exploit the growing fears of a breakdown in law and order, and none more than 1968 Presidential candidate Richard Nixon. He regarded the administration of criminal justice as a war between the good guys and the bad guys and he harshly criticized the Warren Court for "seriously hamstringing the peace forces in our society and strengthening the criminal forces." When, in the next four years, Nixon appointed four Supreme Court Justices—Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist—there were widely prevalent fears (or hopes) that the new Court would dismantle much of its predecessor's work in the criminal-procedure area, especially in discussions on police investigatory practices, the focus of much criticism from Nixon and the Congress.

After all, gone were Earl Warren, Hugo Black and Abe Fortas: three of the five Justices who had made up the narrow majorities in the bitterly contested cases *Mapp v. Ohio* (1961), which held that the rule excluding illegally obtained evidence from Federal trials under the due process clause of the Fourteenth Amendment applied to the states, and *Miranda v. Arizona* (1966), which rejected the traditional "voluntariness" test for the admissibility of confessions; and three of the six majority Justices in *United States v. Wade* (1967), which required counsel at lineups and other pretrial identifications. Moreover, *Mapp*, *Miranda* and *Wade* had all evoked powerful dissents which were likely to be highly persuasive to the new Justices, for Nixon's appointments appeared at the time to be strongly influenced by ideological considerations.

Thus, there was reason to fear (or to hope) that the Burger Court would illustrate the point, made by various Court watchers, that criminal procedure is the part of its work most susceptible to a pendulum swing after a change in personnel, especially a change reflecting an emerging political mood. It has turned out to be more complicated than that.

The Supreme Court's work on criminal procedure in the past fifteen years, especially its rulings on police practices and the rights of suspects, may be divided into three phases. During the first phase, which ran from 1971 through 1976, the Court seemed to be mounting the expected attack on the Warren years. It demolished the 1967 decision on the use of police lineups by limiting *Wade* to only those identifications conducted after an indictment (when relatively few occur), by holding *Wade* inapplicable to photographic identifications and by permitting photo identifications to take place without participation by the suspect's counsel even when the suspect was in custody and therefore available to appear in a lineup.

The Court struck *Miranda* a heavy blow by holding that statements obtained in violation of the *Miranda* rules, even when the police refuse to honor a suspect's request for counsel, may be used to impeach the defendant's credibility if he chooses to take the witness stand. But for supporters of *Miranda* the most ominous note was struck by Justice Rehnquist, speaking for the Court in *Michigan v. Tucker* (1974). He maintained that *Miranda* "recognized" that the elements of the now familiar warnings—such as the right to remain silent and to have a lawyer appointed for a defendant who cannot afford one—"were not themselves rights protected by the Constitution" but only "prophylactic standards."

No, not quite. In *Miranda* the Court "recognized" only that *protective devices other than the warnings* might suffice but it went on to say that unless such other fully effective means were adopted—and there was no contention that they had been in Tucker's situation—the warnings *are* rights protected by the Constitution.

Moreover, since the Supreme Court has no supervisory power over state criminal-justice systems, if the *Miranda* warnings are not derived from the Constitution, where do they come from? By stripping *Miranda* of its constitutional basis, the *Tucker* opinion was preparing the way for the eventual overruling of that landmark case.

During this phase the Court also narrowed the protections against unreasonable search and seizure. For example, the easiest way for police to avoid Fourth Amendment problems is to obtain "consent" to an otherwise unconstitutional

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search or seizure. The scope of the Fourth Amendment will vary greatly depending on how easy it is for the police to prove consent. In *Schneckloth v. Bustamonte* (1973) it was made easy—too easy—for the government to establish that a suspect had given consent. The most important search-and-seizure case of the 1970s was probably *United States v. Calandra* (1974). In ruling that a grand jury witness may not refuse to answer questions on the ground that they are based on the fruits of an unlawful search, the Court referred to the exclusionary rule disparagingly as a "judicially created remedy" designed to enforce Fourth Amendment rights by its deterrent effect, rather than as a "personal constitutional right" of the aggrieved party. The "question [was] not of rights, but of remedies"—a question to be answered by weighing the "potential injury" to the functions of the grand jury against the "potential benefits" of the exclusionary rule in this context. The exclusionary rule lost, as it usually does when the question is presented this way.

Since the costs of the exclusionary rule are almost always described as "substantial" or "long recognized" and the benefits are almost always characterized as "speculative" or "uncertain at best," the Court's "balancing of interests" (in an empirical fog), not surprisingly, has led it to conclude in various peripheral or collateral settings such as Federal civil tax proceedings that the exclusionary rule's benefits, if any, would be less than the costs it imposes on society.

The *Calandra* majority's way of thinking about the exclusionary rule—and this has become the dominant approach—threatens the life of the rule itself. As Prof. Henry Monaghan has pointed out in the *Harvard Law Review*, *Calandra* renders the great constitutional debate over the exclusionary rule merely a dispute over a policy issue "that turns largely on an evaluation of debatable legislative facts, namely, the most effective way to deter police misconduct." If so, why should the courts, rather than the legislatures, evaluate debatable facts? If, as the Court maintains, the exclusionary rule's application turns on "a pragmatic analysis of [its] usefulness in a particular context," as Justice Powell put it, why not replace judicial pragmatism with legislative pragmatism?

The second phase ran from 1977 through 1981. During that period, the Burger Court's hostility to its predecessor's police-practice rulings seems to have subsided. Indeed, the Court's performance in the confessions area must have come as a pleasant surprise to admirers of the Warren Court.

Although at various times during the first phase the Court seemed to be casting a longing eye at the pre-*Miranda* test for a confession's admissibility (Was it voluntary?), the 1977 decision in *Rhode Island v. Innis* gave *Miranda* a fairly generous reading. The Court defined "interrogation" to include "any words or actions on the part of the police [that they] should know are reasonably likely to elicit an incriminating statement." Four years later, *Edwards v. Arizona* invigorated *Miranda* in another important respect. It

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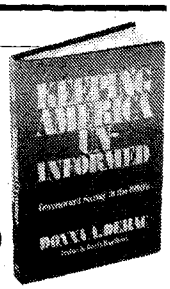

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held that when a suspect invokes his right to counsel he cannot be questioned a second time if he has no lawyer, even if he is given another set of *Miranda* warnings, *unless* he himself "initiates further communication, exchanges or conversations with the police."

Miranda is not the only major Warren Court decision dealing with confessions. *Massiah v. United States* (1964), revivified in 1977 by *Brewer v. Williams*, established that once proceedings against an individual have formally begun—for example, if he has been indicted or arraigned—government efforts to "deliberately elicit" incriminating statements from him, whether done openly by uniformed police officers or surreptitiously by secret agents, violates the individual's right to counsel. Until *Williams*, many had assumed that *Massiah* had been displaced by *Miranda*. In 1980, the Court expanded the *Massiah* doctrine even more in *United States v. Henry* (in an opinion by Chief Justice Burger!), applying it to a situation in which the Federal Bureau of Investigation had instructed its secret agent, the defendant's supposed fellow prisoner, not to question the defendant about the crime, and there was no showing that he had.

Few, if any, court watchers would have predicted it a half-dozen years earlier, but in the early 1980s *Miranda* was not only very much alive but in some respects invigorated, and the *Massiah* doctrine had emerged as a much more potent force than it had ever been in the Warren Court era.

The Court's performance in the field of search and seizure was more mixed. Nevertheless, during this phase it rejected the contention that random stops of automobiles for license and registration checks are free from all constitutional restraints (*Delaware v. Prouse*, 1979); held that a valid warrant to search a one-room bar and the bartender for drugs gave the police "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers" (*Ybarra v. Illinois*, 1980); and, although a majority of the state courts had upheld the practice, invalidated a New York statute allowing the police to enter a suspect's home without a warrant in order to make a routine felony arrest (*Payton v. New York*, 1980). And during this period, the Court showed a strong commitment to requiring warrants for searches.

In the current phase, which some commentators have associated with the retirement of Justice Potter Stewart in the summer of 1981 and his replacement by Justice Sandra Day O'Connor, the Court seems to have picked up where it left off in the mid-1970s.

In the confessions area, a 1983 decision, *Oregon v. Bradshaw*, interpreted the "initiation of further communication" concept from the *Edwards* case two years earlier so loosely that it stripped away much of the protection *Edwards* deemed necessary when a suspect asserts his right to counsel. More important was *New York v. Quarles* (1984), in which Justice Rehnquist, speaking for the majority, once again disparaged the *Miranda* warnings (as he had done a

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decade earlier in the *Tucker* case) as merely prophylactic rules. *Quarles* also established a "public safety" exception to the *Miranda* warnings, an exception of unknown dimensions that may make the *Miranda* requirements much more difficult to understand. And the majority again implied that *Miranda* consisted of nothing more than a judicial balancing act in which the benefits of "enlarged protection for the Fifth Amendment privilege" were weighed against the costs to society.

It is in the area of search and seizure that the Burger Court, after a mixed performance for a number of years, seems to have hit its stride. All nine search-and-seizure cases decided by the Court during the 1982-83 term had been decided in favor of the defendant in the lower courts. In the Supreme Court the government won seven, and the two it lost, *Florida v. Royer* and *United States v. Place*, were hardly total losses, for each established propositions that should prove quite useful to law-enforcement officials in the years ahead. Thus, it might be said that the government won seven complete victories and did no worse than a couple of ties.

It is not simply a matter of won-lost statistics, however. As Prof. Wayne LaFave, author of the leading treatise on search and seizure, said of the 1982-83 cases: "More significant [than the results] is the tenor and style of these decisions; it is almost as if a majority of the Court was hell-bent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials," a point that Justice John Paul Stevens has complained about recently. As LaFave wrote of *United States v. Knotts* (1983), which held that the monitoring of a suspect for many miles by means of a beeper until the suspect's car stopped at a certain cabin was not a search, "the Court set out unnecessarily broad dicta on . . . the constitutional irrelevance of sense-augmenting devices generally." And in *Michigan v. Long* (1983), "the Court upheld a search of a suspect's vehicle without probable cause to arrest or search, though the lower court's decision to the contrary rested on what theretofore would have amounted to an independent state ground" and the Supreme Court ordinarily would not have reviewed the case.

"This headlong rush into the conferral of broader police power," wrote LaFave, may be attributable to the Court's belief that more law-enforcement tools are essential to combat the drug traffic—all nine search-and-seizure cases involved drugs. But I share his concern that the horrors of drug trafficking may yet produce "the ultimate injury: atrophy of the fourth amendment and consequently 'the irretrievable impairment of substantial liberties.'"

The past term brought more of the same. *Immigration and Naturalization Service v. Lopez-Mendoza* held that the exclusionary rule does not apply in civil deportation proceedings, despite the dissent's persuasive argument that civil deportation proceedings are to I.N.S. agents what criminal trials are to police officers. And in one of the most important search-and-seizure cases decided in many years, *United States v. Leon*, a 6-to-3 majority adopted the often proposed "good faith" exception (it should be called a "reasonable mistake" exception) to the exclusionary rule. Why a "good faith" exception to the exclusionary rule was necessary when only a few years earlier, in *Illinois v. Gates* (1981), the Court significantly diluted the "probable cause" standard for arrests and searches, was unexplained.

Although *Leon* arguably is applicable only where the police have a search warrant, it is highly doubtful that it will be confined to the warrant setting. Running through Justice Byron White's opinion in *Leon* is a strong skepticism that the "extreme sanction of exclusion" can "pay its way" as an effective deterrent unless the underlying Fourth Amendment violations are deliberate or at least substantial.

Ever since the "deterrence" rationale and its concomitant "interest-balancing" came to the fore in the *Calandra* case, the exclusionary rule has been sitting under a sword of Damocles. But *Leon* is more significant than *Calandra* or its early progeny, which declined to apply the exclusionary rule in various peripheral or collateral settings. For *Leon* takes a good-size bite out of the exclusionary rule in its central application—the prosecutor's case-in-chief against the direct victim of a Fourth Amendment violation. And it frays the thread that holds the cost-benefit sword over the exclusionary rule itself.

The past two Supreme Court terms have produced mounting evidence that, after the passage of a number of relatively quiescent years, or at least years when its performance has been mixed, the Court may yet demonstrate that in the area of criminal procedure, especially, changes in personnel reflecting changes in the public mood do indeed lead to wide swings of the pendulum. At this point there is more cause to fear (or to hope) than there has been for some time that the swing of the pendulum may ultimately turn out to be quite pronounced. Not a few would maintain that it already is. □

CAPITAL PUNISHMENT

On Death Row, The Wait Is Over

MICHAEL MELTSNER

In the years following World War II, the number of executions in this country, as well as in Canada, Great Britain and Western Europe, decreased steadily. One reason for the decline was a loss of faith in the utility of the death penalty to deter murder more effectively than a long prison sentence. Few criminals bent on killing believe they will be caught; most homicides are the product of intrafamilial passions or psychological pressures that remain unaffected by the dimly perceived prospect of a

Michael Meltsner, one of the lawyers who represented the petitioners in Furman v. Georgia, *is the author of* Cruel and Unusual: The Supreme Court and Capital Punishment *(Random House).*

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death sentence. Whether in theory more frequent executions would protect human life, jurors recommend the death sentence in only about 10 percent of the cases where it is an available sanction. Thus, even a calculating killer has little reason to hesitate out of fear for his life. To skepticism about the capacity of the death penalty, as administered, to reduce the murder rate, 1960s civil rights activity added another factor: greater sensitivity to the role played by poverty and race in capital sentencing. For the same crime, blacks stand a far greater chance than whites of receiving a death sentence.

In 1972 such themes were the background for *Furman v. Georgia,* in which the Supreme Court startled the legal world by holding that the procedure for selecting the condemned violated the Constitution. For decades, juries and judges had been given complete discretion, unfettered by legal standards, when deciding whether convicted murderers were to be executed or sentenced to prison. In contrast to the complex rules governing the determination of guilt, sentencing was literally lawless. The result was a pattern of "arbitrary" and "freakish" sentencing decisions which, according to the Court, amounted to cruel and unusual punishment in violation of the Eighth Amendment. With a stroke, *Furman* invalidated virtually all existing death penalty laws and removed the threat of execution for more than 600 men and a handful of women.

Those in the *Furman* majority—who had all served under Chief Justice Earl Warren—could not agree on the basis of the ruling, and the four Nixon appointees (Chief Justice Warren Burger, Justices Lewis Powell, Harry Blackmun and William Rehnquist) dissented. Justices William Brennan and Thurgood Marshall thought the death penalty unconstitutional per se, but because Justices Potter Stewart, Byron White and William Douglas focused on the means employed to select the condemned rather than on capital punishment itself, the states remained free to enact death sentence laws. One possible response by the states was to spell out the aggravating and mitigating factors that juries and judges should consider in deciding who lived and who died. Another was to eliminate sentencing discretion entirely, making death mandatory upon conviction of a capital crime. (In hindsight, White's objection to wide-open discretion proved critical; prevailing sentencing laws provided so little guidance about which factors merited execution that juries had been unable to winnow out the "worst" offenders and subject only them to death.)

On July 2, 1976, the Court decided five cases involving versions of both those schemes. In *Gregg v. Georgia* and two companion cases, it ruled that "guided discretion" provided sufficient protection against arbitrary infliction of death if judges or jurors had been told the rules governing the life-death choice and had an opportunity to hear background facts about defendants and their crimes. From this affirmation of capital punishment as constitutionally permissible, only Brennan and Marshall dissented. In *Woodson v. North Carolina* and *Roberts v. Louisiana*, a different lineup of Justices rejected the designation of certain crimes as carrying mandatory death penalties. Stewart, Powell and Stevens, joined by Brennan and Marshall, concluded that "human dignity" required consideration of the "character of the individual offender and the circumstances of the particular offense" before "imposing the ultimate penalty of death." In short, seven Justices thought "guided discretion" enough to legitimate the death penalty; four thought capital punishment permissible even if the death sentence followed automatically upon conviction; two rejected the death penalty regardless of the crime or the criminal.

During the next six years, the Court refined the *Gregg* standards. In 1977 and 1982, it held that the death penalty may not be imposed for rape or on a defendant who participated in a crime in which someone was killed but did not commit the murder or intend to do so. Other procedural rules were mandated: mitigating factors must be considered by the sentencing judge or jury; a death sentence may not be based on material not revealed to the defendant; because of the prohibition of double jeopardy, the death penalty may not be imposed in a retrial if the defendant received a noncapital punishment in the first trial.

But by 1983, the Burger Court majority began to lose patience with the long delays in executions and insisted that death sentences be carried out. In a particularly harsh outburst, the Chief Justice lashed out at lawyers who persisted in bringing appeals to save their clients, charging they were engaged in "calculated efforts to frustrate valid [death penalty] judgments," and adding that "at some point there must be finality." In the last two years, the Court has rejected almost every appeal of a death sentence.

Although the Court continues to embrace the theory of guided discretion enunciated in *Gregg*, it has steadfastly refused to consider how it works in practice—whether tightening procedures has eliminated the arbitrary and freakish sentences that were held unconstitutional in *Furman*. More recently, it has shown itself willing even to allow a good deal of error in the sentencing process. In a 1983 case the Court approved a special summary procedure for death penalty cases, leading Justice Marshall to complain that the Court would "afford less consideration to an appeal in which a man's life is at stake than to an appeal challenging an ordinary money judgment."

The Court has also declined to weigh powerful evidence that race or fortuitous circumstances such as geography determine who is sentenced to death. The Justices have shown a strong unwillingness to postpone execution dates and have taken a strict view of Federal habeas corpus petitions by death row inmates. This year, in *Pulley v. Harris*, the Court decided that nothing in the Constitution requires state courts to rule out a death sentence merely because a lesser sentence had been imposed on someone similarly culpable in a similar crime. The opinion, written by Justice White, who had voted in *Furman* to declare state laws invalid because lower courts had rarely chosen the worst criminals to die, marks a retreat to yesteryear.

Why was the Court unwilling to go further than it had in *Furman*, either by putting teeth in its guided discretion

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standard or by abolishing capital punishment? In the mid-1960s the anti-death penalty movement suggested to the Court two routes toward its goal of abolition, short of a single dramatic decision ending capital punishment. One was to tighten procedures to the point where only a very few highly culpable criminals would be sentenced to die. It was the belief of abolitionist lawyers that making such distinctions would prove so difficult, cumbersome and costly that capital punishment would eventually be abandoned. The strict-procedures approach had the virtue of not exposing the Court to the intense criticism—not to mention provoking efforts to amend the Constitution—that would surely have followed total abolition, but it left until another day the question of whether the Court would accept the new death penalty laws the states would enact.

The other possibility raised by lawyers opposed to the death penalty was to give constitutional recognition to the fact that capital punishment in this country has always been linked to race. Although the form differed by case, lawyers presented both the Warren and Burger Courts with the opportunity to rest anti-capital punishment decisions on the inability of the death sentencing process to eliminate race as a decisional factor. But the Justices have always ducked that argument. In *Furman* only Justice Douglas emphasized the disproportionate number of death sentences handed out to blacks. When the Court ruled, in *Coker v. Georgia* (1977), that the death penalty was a cruel and unusual punishment for the rape of an adult woman, it ignored evidence showing that the death penalty for rape was given almost exclusively to blacks who had raped whites. Sentencing discretion may have been narrowed under post-*Furman* statutes, but despite a new set of rules, judges and jurors still reach discriminatory results by valuing the life of black and white victims differently. In Georgia, for example, the state is nine times more likely to send the killer of a white to death than the killer of a black. Researchers have found a similar pattern in other death penalty states. The discretion that abides at key points in the trial process—what to charge, whether to plea-bargain, whether to convict of a lesser crime or sentence to prison—is still employed, consciously or unconsciously, to favor whites. But a ruling on this ground, essentially a holding that the judicial system (including thousands of jurors) has been guilty of institutional racism, is unpalatable to the Justices.

The Court chose in *Furman* to exercise one of what the late constitutional expert Alexander M. Bickel called the "passive virtues," attempting to honor both principle and prudence by wiping the statute books clean of death laws but allowing the political process to restore them in revised form if there was a popular will to do so. The Court's approach mediated between, in Bickel's phrase, the "ultimates of legitimation and invalidation." The Warren Court had done as much with the famous "deliberate speed" formula in the school segregation cases. Nothing was the same after *Brown v. Board of Education* (1954) because, hesitant and partial as the Court's support was, powerful forces rallied to reject racial bias in education, employment and other areas.

Things have turned out differently for the death penalty. Several Justices reportedly believed capital punishment would wither away after *Furman* and welcomed removal of the burden of making life-and-death decisions. But by choosing to avoid the racial issue in favor of a ruling based on criminal procedure, the Court stimulated a public debate over deterrence and just deserts rather than discrimination. Abolitionists lost the debate. Soon after *Furman*, California voters amended the state Constitution to overrule an abolition decision of the State Supreme Court; Massachusetts later followed California's lead; and more than thirty-five states quickly enacted new death penalty laws. Over 1,300 men and women now wait on death row. Anywhere from fifty to one hundred of them may be executed in the next two years.

In a century of World Wars and genocide, of Hiroshima and political murder, in a country where homicide is commonplace, efforts to abolish one form of killing through the courts seem almost romantic. If violence is everywhere, why should judges in particular stand against the crowd? Execution is one end of a bureaucratic process that fragments responsibility. The fear of crime is widespread and the value of a killer's life debased. Of what great cost is it to add a few more bodies to death's already bloated count?

The Burger Court's record, however, is no less disappointing for being an understandable reaction to national values. What other government institution with comparable power can be expected to inquire calmly into the relationship between crime and race, punishment and conduct, private and state-inflicted violence? Where else in public life are we likely to find a measured view of human nature that permits rejection of execution despite outrage at violence, despite identification with victims, past and future—a moral calculus that does not confuse understandable feelings of revenge with a need to behave monstrously?

Such attitudes are hard to find in legislative chambers and executive offices, especially when the voices of tiny constituencies favoring abolition are overwhelmed by polls that make it all too clear where the majority of voters stand. The quality of legislative debate over capital punishment runs from lackluster and uninformed to knee-jerk and demagogic. But courts are supposed to be different. Judges are protected from the electorate; it is their job to consider matters of principle and equity, to take the longer view, even if that means opposing the popular will. And many judges have enough experience in the operation of criminal law to know that the uselessness of the death penalty as a crime-prevention device is matched only by its capacity to weave racial and class distinctions into the fabric of the law. Can one have faith in the reliability of *any* capital sentencing selection process?

Alas, the Burger years have been characterized not only by a reluctance to resist public pressure but by a lack of interest in reviewing the implications of trying to electrocute or gas away the problem of violence. Warren-era Justices attempted to facilitate the elimination of a penalty that under modern conditions has more sacrificial and psychological than penological consequences. They began a process

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that could have confined capital punishment to an exceedingly small set of cases. The Burger Court first halted and then reversed that process. It is acceptable that the Justices show themselves pragmatic and even, in a sense, political, but when life is on the scale, we have a right to expect something more. With respect to capital punishment, something more means confronting the results of post-*Furman* death sentencing and requiring that the states either give up racial and other arbitrary selection of the condemned or give up the death penalty. This agenda awaits another Supreme Court, perhaps another century. □

CHURCH AND STATE

Some Cracks In The Wall

NORMAN REDLICH

The issue of the relationship between church and state is even older than the Republic. Church schools were trying to tap public funds before there was a Constitution. One such effort, in Virginia in 1784, led to the First Amendment's prohibition against laws "respecting an establishment of religion." For most of our history the reality of religious pluralism and the principles of the First Amendment combined to make church-state relationships a relatively dormant area of constitutional law. After World War II, strong political pressures led to the enactment of state and Federal laws that raised the prospect that vast sums of money would be available for religious education. By 1969 it was apparent that a major constitutional decision on church-state relationships was in the offing.

Although the issue was an old one, most of the Supreme Court cases were recent, and they provided a set of conflicting precedents. On the one hand, a series of cases from 1947 to 1968 had established rather clear guidelines prohibiting the use of public schools for religious observance. In the 1948 *McCollum v. Board of Education* decision, the Court held that religious training by private groups in public school facilities violated the establishment clause of the First Amendment. In *Engel v. Vitale* in 1962, the Court struck down the so-called nondenominational Regents' prayer in New York State's schools; a year later it extended the *Engel* ruling to Bible reading and to recitation of the Lord's Prayer as part of a formal school ceremony. Separation of church and state and neutrality among religions emerged as the dominant themes governing the interpretation of the establishment clause.

At the same time, countervailing constitutional doctrines allowed government to extend some financial aid to religious schools. Clearly, general welfare laws, such as those providing police and fire protection, could not exclude religious institutions. Some assistance to religious institutions was necessary to avoid hostility to religion and to protect the First Amendment's guarantee of its free exercise. Responding to those concerns in 1947, a sharply divided Court upheld a law that reimbursed parents for the cost of transporting their children by bus to parochial schools, stating it was a social benefit to spare the children from walking to school on dangerous roads. And in 1952, only four years after it had barred the teaching of religion by outside teachers in public schools, the Court upheld New York's "released time" system, which excused students from school for religious instruction. In 1961, the Court sustained Sunday closing laws on the ground that regardless of their origin, their "present purpose and effect . . . is to provide a uniform day of rest for all citizens." Then, one year before Chief Justice Earl Warren's retirement, the Court upheld a system whereby textbooks selected by school boards were loaned to individual students attending parochial schools.

The Court under Warren Burger faced its first major test on the religion issue in 1970, with *Walz v. Tax Commissioner of New York*, and to no one's surprise, it upheld New York's real property tax exemption for churches. Given the long history of the tax exemptions and the financial dependence of religious institutions on them, a contrary decision was unthinkable. But instead of relying solely on neutrality (all charitable entities are treated alike) or arguing that a tax exemption was not a benefit, the Court emphasized the tradition of real estate tax exemptions for churches and, more important, pointed out that taxing churches would "entangle" the government in their affairs.

By 1971, when the Court faced the issue of state financial aid to parochial schools, it had developed a three-part test by which to judge the constitutionality of government programs in support of religion. To be valid the practice must have a secular purpose; its principal effect must neither advance nor inhibit religion; and it must not force an excessive government entanglement with religion.

Applying the test that year in *Lemon v. Kurtzman*, the Court struck down Rhode Island and Pennsylvania laws that provided for the payment of salaries to parochial-school teachers of secular subjects. Writing for a near-unanimous Court, Chief Justice Burger argued that the practice caused entanglement between church and state. The other Nixon appointee at the time, Justice Harry Blackmun, joined the Chief Justice, and only Justice Byron White, a Kennedy appointee, was in partial dissent.

During the decade that followed, the Court struggled with a variety of state laws designed to help religious schools without running afoul of the strictures laid down in *Lemon*. Held invalid were expenditures for instructional materials, maintenance and repair, field trips, and therapeutic and remedial services performed on religious school premises. Upheld were state allocations for the costs of state tests administered to determine the adequacy of instruction, for remedial programs conducted off the school premises and for construction grants for facilities devoted exclusively to

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secular purposes at church-affiliated colleges.

As a result of the Court's decisions, significant direct government financial assistance to religious schools was cut off, and public funding cases were contested on rather narrow grounds; for example, whether remedial programs were conducted on or off the school premises, or whether tests for which reimbursement was sought were prepared by the state or by the teacher. Those distinctions exemplify the kind of lines courts must draw as they apply broad principles to specific cases.

In the 1970s, relying on those school prayer and parochial-school aid cases, the Supreme Court and lower Federal and state courts prohibited clearly religious practices in public schools, such as placing a cross or other religious symbol in public areas and displaying the Ten Commandments in classrooms. None of those cases, however, prohibited all government involvement with religious subjects. Singing Christmas carols, the objective teaching of religion and studying the Bible as literature were upheld as secular activities.

In 1981, the Reagan Administration came to power supported by an evangelical constituency that placed religious issues at the top of its political agenda. That group has infused into American political and legal discourse a sectarian fervor that has had a profound effect on the development of constitutional law.

Despite his majority opinion in *Lemon*, Chief Justice Burger had tended, in close cases, to favor state support for religious practices even before Reagan became President. Justice William Rehnquist almost always did, as did Justice White. Justice Potter Stewart was inconsistent on establishment clause cases; his replacement, Justice Sandra Day O'Connor, provided a more predictable and younger voice in support of the Rehnquist position.

The most important shift was Justice Lewis Powell's. In 1973 he had written a major opinion invalidating a complex New York program of tuition grants and tax benefits to parents of children attending nonpublic schools, and he appeared to understand the historical origins of the establishment clause, in his home state of Virginia. But Powell seems increasingly concerned with accommodating government conduct to religious practices, at the expense of the Madison-Jefferson tradition that recognized church-state separation as essential to the defense of religious freedom.

The changes in personnel and philosophy have created a Court majority whose decisions in three important church-state cases during the past two terms threaten the fabric of the constitutional system that has given this country a degree of religious freedom and diversity unknown to any other nation. On June 29, 1983, in *Mueller v. Allen*, the Court upheld a Minnesota statute that granted limited tax deductions to parents for the costs of tuition, textbooks and transportation for their children's education, whether they attended public or private schools. The majority opinion was written by Rehnquist, who was joined by Burger, White, Powell and O'Connor.

In earlier cases the Court seemed to have concluded that using the tax system to provide benefits to parents of children attending religious schools violated the establishment clause, whether the financial assistance took the form of a tax credit or a tax deduction. To distinguish its statute from those previously invalidated, Minnesota gave tax breaks for public as well as private school expenses. Even though public school families could claim only a few of them (indeed, it was estimated that from 84 to 96 percent of the parents eligible for the tax deductions sent their children to religious schools), the Court held that the Minnesota law did not violate the establishment clause.

In the context of the Reagan Administration's strong political effort to push a tuition tax credit plan through Congress, the *Mueller* case took on an ominous significance. But in the year since it was decided, no tuition tax credit bills were enacted either in the states or in Congress. There are technical differences between the plan approved by the Supreme Court in *Mueller* and the Reagan proposals, and if the Court were to confine its reasoning to the specific facts of the Minnesota plan, an attempt to enact it on a national scale might not be upheld. Also the Reagan tuition tax credit proposal faces the fiscal reality of $200 billion deficits and the determined opposition of supporters of public education.

Some observers concluded that because of its narrow majority and limiting circumstances the decision did not pose a serious threat to the separation of church and state. A second case, decided one week later, struck a sharper blow. In *Marsh v. Chambers* the Court decided that Nebraska's practice of opening state legislative sessions with a prayer, delivered by a chaplain on the public payroll, was not forbidden by the establishment clause. Burger's majority opinion (Brennan, Marshall and Stevens dissented) was based almost entirely on a historical argument that the challenged practice was identical to that adopted by the Congress that approved the First Amendment in 1789. The Court said that the issue of legislative chaplains was considered by the framers and apparently not viewed as the type of evil that the establishment clause was designed to prevent. But the Court paid little heed to the fact that the same Protestant chaplain had been employed for sixteen years, and it ignored evidence that no non-Christian could hope to hold that position.

The opinion contained a troubling comment. Instead of viewing the Nebraska practice solely as a historical exception to the establishment clause, the Chief Justice described it as "simply a tolerable acknowledgement of beliefs widely held among the people of this country." At the time, I wrote, in *Our Endangered Rights*, "Such language, lifted out of the context of the opinion, could be used to argue in favor of public displays of Nativity scenes or other religious symbols, or even prayer." Unfortunately, I was right.

It is hard to imagine a practice more at odds with the principles of the establishment clause than the prominent display, at government expense, of an avowedly religious scene, the depiction of the birth of Christ, as part of the Christmas decorations in front of the City Hall in Pawtucket, Rhode Island. The endorsement of this religious symbol indicated a preference for one creed over another,

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excluded religious minorities and nonbelievers from a municipally-sponsored observance, divided the community along religious lines and demeaned the faith it purported to support by secularizing it. Two lower Federal courts had held that the construction and display of the crèche was unconstitutional. The Justice Department filed an amicus brief urging the Supreme Court to reverse, and in *Lynch v. Donnelly*, decided this March, a 5-to-4 majority led by the Chief Justice acquiesced.

With an incredible insensitivity to the beliefs of religious Christians and of non-Christians alike, Burger wrote:

> Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

As if anyone would seriously suggest that the display of a painting in a museum has anything to do with government support of religion!

The opinion did reaffirm the school prayer cases, and emphasized that the crèche was part of a display depicting "the historical origins of this traditional event long-recognized as a National Holiday." Thus, it was presented as comparable to Christmas songs, Sunday closing laws and legislative chaplains on the government payroll.

As in the Minnesota and Nebraska cases, it is possible to view the Rhode Island decision as a narrow modification of earlier doctrine. (And in an 8-to-1 decision last year the Court threw out a Massachusetts law allowing a church to veto the location of a saloon within 500 feet of its premises.) Moreover, shortly after *Lynch*, the Court unanimously and summarily reaffirmed the school prayer decisions.

In light of *Lynch*, however, it is hard to be optimistic about the Court's disposition to strike down state laws requiring moments of silence or silent prayers. A greater danger lurks in an appeal of a lower court decision invalidating a Grand Rapids, Michigan, "shared-time" program for remedial education conducted by public-school teachers in religious schools. The silent-prayer and shared-time cases will probably be decided by the Court in its next term.

And before long, the Court will have to decide on a law compelling school officials to open their facilities to so-called student-initiated religious clubs. Three years ago, in *Widmar v. Vincent*, the Court held that a state university that makes its campus available for meetings by political and social groups may not deny access to student religious groups, even if they engage in worship. Proponents of school prayer have sought to build on the *Widmar* case by requiring school officials to permit high-school students to organize groups for religious purposes, including prayer, on school property. Some districts have agreed, but most courts that have considered the issue have ruled that such meetings are a form of public-supported religious education. In effect, these courts accept the principle that, at least in a high-school context, religious speech and prayer, even as an ex-

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tracurricular activity, are a form of state involvement and endorsement that constitute a violation of the establishment clause.

Unable to succeed in the courts, proponents of "equal access" turned to Congress, which, after months of wrangling, passed by an overwhelming majority a bill requiring school officials to allow student-initiated political and religious meetings to be held before or after instructional hours. The bill's supporters included many who had fought against President Reagan's proposed school-prayer amendment and many who sincerely believe the bill will serve the interests of student free speech.

Religious groups will have no difficulty making requests appear to have been student initiated. It is no wonder that in a recent interview, the Rev. Jerry Falwell described the equal-access bill as achieving everything that the proponents of school prayer have always wanted. It is unfortunate that Congress, having defeated a constitutional amendment on school prayer and resisted pressure for tuition tax credits, finally yielded to the religious right and passed the equal-access bill. The battle will shift to the courts.

During the past fifteen years, establishment clause issues have overshadowed the traditional "free exercise" cases which faced courts with assertions of individual religious belief against the secular interests of the state. Here, the Burger Court has tried to balance the two, generally tipping in favor of religious belief except when faced with a compelling secular interest. Last year, in *Bob Jones University v. United States*, the Court denied a tax exemption to a segregationist college, dismissing the claim that the racially discriminatory practices were based on religious belief. Similarly, the integrity of the tax system warranted that the Court deny an Amish farmer the right to refuse to pay Social Security taxes for his employee because of religious belief. On the other hand, the Court did uphold the right of the Amish to educate their children, during adolescent years, at home rather than in public schools. This term, the Court will decide whether a state can prohibit an employer from requiring an employee to work on the day he or she designates as the Sabbath. In those areas I cannot seriously fault the Burger Court, although I disagree with it on particular cases.

But a shifting majority of the Burger Court, while paying lip service to Jefferson's metaphorical "wall of separation" between church and state, is unfortunately taking the politically expedient route of permitting government accommodation to dominant religious views. So far, this majority has not overruled the precedents of the Warren and Burger Courts; indeed, it has constantly reaffirmed them. But those precedents could become historical relics as prayers and religious teaching return to the public schools, more tax dollars are diverted to support religious schools and religious symbols dot the landscape. Unless the trend of the past two years is stopped, we will be fighting one another on religious grounds while our precious heritage of religious tranquillity and freedom gradually slips away. □

SEX DISCRIMINATION

Closing the Law's Gender Gap

WENDY W. WILLIAMS AND
JUDITH L. LICHTMAN

Nineteenth-century laws that classified by sex were based on an all-encompassing duality. Sometimes called the "separate-spheres ideology," its chief characteristics were segregation and complementarity. Men were assigned to the lifelong role of breadwinner, head of household and representative in the social state; women, to the role of childbearer and rearer and keeper of the home. The roles were considered to be dictated by nature: the physical, mental, psychological and moral attributes of the sexes designed them for distinct life courses. Masculine and feminine characteristics were expressed as complementaries: strong–weak, intellectual–emotional, self-sufficient–dependent, aggressive–passive, sexual–asexual, dominant–subordinate, protector–protected. The law merely reflected nature's and God's allocation of earthly tasks.

This role allocation required a trade-off between the sexes, at the core of which was the husband's undertaking to support and protect his wife in return for her services to him and his children. An elaborate legal edifice was constructed, prescribing, first, reciprocal rights and duties within marriage, giving the husband ownership or management of property, prerogatives about sex, discipline and family location, and rights concerning custody and control of children; second, civil status, curtailing the wife's power to contract, to sue and be sued and to earn a living; and third, relationships to government, making the husband the family's representative, who alone could vote, hold office and participate in the justice system. Men, of course, also went to war to protect home and country while women stayed behind to "keep the home fires burning."

Despite the hierarchical character of this arrangement, the separate-sphere ideologists proclaimed that the spheres were of equal dignity and importance. Sex-based classifications were essential, they argued, to provide women, who were inherently unequal to men, with "true equality" and to protect them. Thus, laws that treated women differently from men were viewed as essentially compensatory, accommodations to women's innate differences and, as the Supreme Court reiterated over the years, to women's special burdens of childbearing and rearing.

By 1969, when Warren Burger became Chief Justice, law students were taught that in deciding discrimination cases

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under the equal protection clause of the Constitution, the Supreme Court employed a two-tiered standard of review. In suits challenging classifications based on race and national origin, the Court applied "upper-tier" review. (It did the same for classifications based on "fundamental rights," but that is another story.) Those classifications were considered "suspect," were scrutinized "strictly" and were presumed invalid unless the government could show that they were "necessary to a compelling state interest" and that there were no "alternative ways" to achieve the state's objective. The "lower tier" included all other legislative classifications. Challenges to the constitutionality of one of those would fail if the Court found "any conceivable rational basis" for the classification. In practice the standard worked like an electrical switch: if the classification made it into the upper tier, the legislation would be struck down; if not, it would be upheld. Needless to say, classifications based on gender were originally assigned to the lower tier.

Shortly after Burger joined the Court, a reborn feminist movement set out to hoist gender-based legislation into the upper tier. The first sign of progress appeared in 1971. In *Reed v. Reed*, in an opinion written by the new Chief Justice, a unanimous Court struck down a law preferring men to women as estate administrators. For the first time in its history, the Court invalidated sex-based legislation under the equal protection clause. Sex classifications, the Court said, were "subject to scrutiny" and must "bear a fair and substantial relation to the object of the legislation," a standard with noticeably more bite than the "any conceivable rational basis" approach of the lower tier.

Two years later, in *Frontiero v. Richardson*, the Court struck down a statute that granted male members of the armed services greater benefits for their families than female members. Four Justices went further and voted to treat sex classifications like race classifications. The fifth Justice needed to deliver a majority for the strict standard of review failed to materialize, however, and over the next few years, Justice William Brennan, author of the plurality opinion in *Frontiero*, developed an alternative strategy for gender cases. Picking up on the stronger formulation suggested in *Reed*, he wrote in *Craig v. Boren* (1976), that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Since then, a majority of the Court has frequently used Brennan's *Craig* standard to strike down sex-based legislation.

In *Craig*, Brennan identified two government interests that would not be considered important. One was administrative convenience, such as saving money or simplifying procedures. The second was more radical. "Fostering 'old notions' of role typing" was no longer a constitutionally acceptable government purpose. Brennan reiterated that "no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."

This was a breathtaking stroke. Traditional role assignments had been the basis of most family law doctrine and an organizing principle for government benefit schemes as di-

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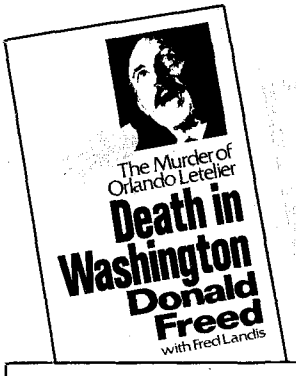

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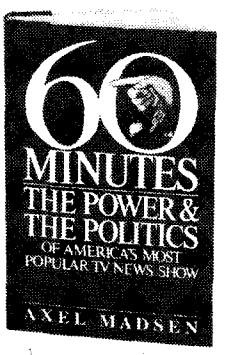
verse as Social Security, welfare and workers' compensation. And the point is not that such policies are, as Brennan said, "unimportant"—their wisdom is debatable but their importance is not. What Brennan should have said, because it was surely what he meant, is that they are constitutionally unacceptable.

The doctrine Brennan announced struck directly at the separate-spheres ideology. With *Craig* it became apparent that the Court was engaged in nothing less than the dismantling of the breadwinner/homemaker dichotomy. In cases that have spanned the Burger years, the Court has insisted that female wage earners receive the same benefits for their families under military, Social Security, welfare and workers' compensation programs as men do; that men receive the same child-care allowance when their spouses die as women do; that the daughters of divorce be entitled to support for the same length of time as the sons; that the duty of support through alimony not be visited exclusively on husbands; that wives as well as husbands participate in the management of community property; and that wives as well as husbands be eligible to administer deceased relatives' estates.

This transformation required the Justices to see the world in a different way. Whereas earlier Courts reflected society's conviction that distinct fundamental physical and mental qualities destined the sexes for different functions throughout their lives, today's Court, with some important qualifications, sees the sexes as leading essentially similar lives. The view is expressed as a presumption that a sex-based law is unconstitutional and will be struck down unless a heavy burden of justification is met. When the Court has applied the *Craig* standard and made the defender of sex-based legislation justify it, that legislation has fallen.

But the Brennan approach is only precariously anchored in Supreme Court jurisprudence. While Justices Thurgood Marshall and Byron White can be counted on to apply the *Craig* standard, a substantial minority of the Justices—indeed, from time to time a majority—do not approach gender classifications so rigorously. Justice William Rehnquist, the Court's most conservative member, and Justice Potter Stewart, now retired, fashioned a significantly less stringent standard of review, which is characterized by a predisposition to see clear differences between the sexes and by a lackadaisical attitude toward whether those sex differences are relevant to the situation before the Court. The Chief Justice has routinely concurred with the Rehnquist-Stewart opinions. Justices Harry Blackmun and Lewis Powell swing one way or the other, moved by the facts of a case rather than a consistent philosophy, while Justice John Paul Stevens has worked out an idiosyncratic approach which usually, but not always, aligns him with the Brennan group.

And what about the newest Justice, Sandra Day O'Connor? Despite her otherwise impeccably conservative voting record, she has emerged as the Court's most liberal member on the standard of review in gender cases. In *Mississippi*



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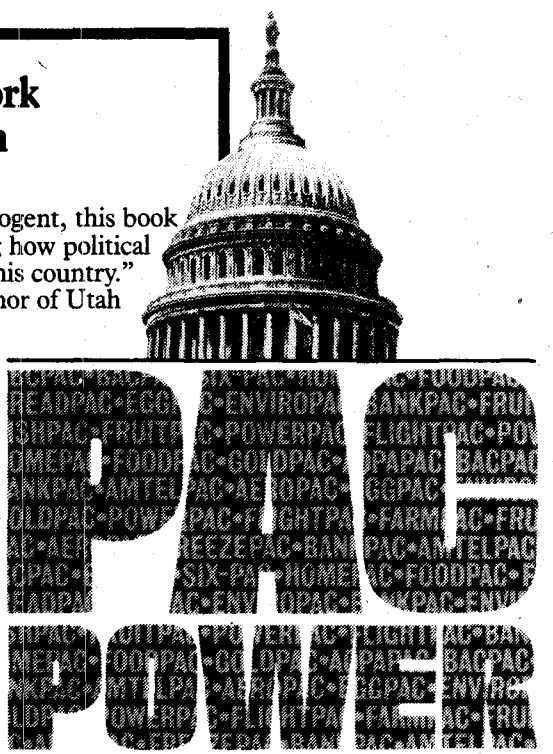

INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES

LARRY J. SABATO

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University for Women v. Hogan (1982), she out-Brennaned Justice Brennan, writing that when the purpose of a statute is to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." In a footnote, she even suggested that the strongest standard of review—that used in race cases—might be the proper one. This raises to four the number of Justices who faithfully adhere to a tough review standard in gender cases.

The Rehnquist-Stewart line prevails in cases concerning sexuality and reproduction. In those cases, a much diminished but persistent concept of "real" difference between the sexes has survived the abolition of the separate-spheres ideology. Because legislation bearing on reproduction and male-female sexuality conjures up the distinctive reproductive anatomy of the sexes and the image of difference and complementarity that comes with it, in cases involving such legislation, apparent differences blind the Court to what the sexes have in common and make old hierarchies seem dictated by nature.

In *Dothard v. Rawlinson* (1977), for example, the Court upheld the exclusion of women from the position of guard in a male maximum-security prison. "The likelihood that inmates would assault a woman because she was a woman would pose a real threat . . . to the basic control of the penitentiary and protection of its inmates and the other security personnel," declared Justice Stewart, writing for the majority, even though the only evidence was to the contrary. Woman's "very womanhood," he concluded, renders her ineligible for the job.

Dothard's reliance on the stereotype of man as sexual aggressor and woman as sexual object provided the underpinnings of Justice Rehnquist's opinion in *Michael M. v. Superior Court* (1981), in which the Court upheld the statutory rape conviction of a 17-year-old man under a California law that punished men for consensual sexual intercourse with women under 18 years of age but did not punish the women. The case was an especially rich candidate for confusion because a majority of the Court viewed it as dealing with reproductive as well as sexual differences. It seemed obvious to the Court's majority that the statute was founded on a "real difference" between men and women. Since young women can become pregnant, thus suffering untoward consequences of teen-age sex to a far greater extent than young men, a criminal penalty for men provides an artificial deterrent to match women's natural deterrent. A statutory rape provision limited to males thus equalizes the otherwise unequal positions of the sexes. There was no evidence whatsoever that the statutory rape provision deterred a single California teen-ager from having intercourse, nor did the Court seem to care that venerable statutory rape laws originated from the desire to protect "young girls" from loss of virginity, and thus diminished marriageability, rather than to prevent pregnancies.

It is when the Court reaches legislative classifications based

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on pregnancy that the issue of real differences takes its most dramatic turn. In 1974 in *Geduldig v. Aiello*, Justice Stewart wrote for the Court that a classification that excluded pregnancy-related disabilities from California's comprehensive disability insurance program was not sex discrimination because it sorted out people by whether they were pregnant or not, not by whether they were men or women. The statute thus did not discriminate against women but only removed a type of physical disability—pregnancy—from the list of those compensated by the program.

Two years later, in *General Electric Co. v. Gilbert*, Justice Rehnquist added the *coup de grâce*: pregnancy, he said, was an extra disability of women that men did not share; to compensate women for pregnancy-related disabilities might well discriminate against men. Thus, man is the benchmark. Since the unique reproductive anatomy of women is simply an add-on to the basic male model, coverage of pregnancy would give women more than men got.

To some extent, the Court has grasped the centrality of reproductive issues to women's lives, but in cases brought under the due process rather than the equal protection clause. In *Roe v. Wade* (1973), the most significant of those, it recognized a woman's right to choose whether to have an abortion. Other decisions have restricted state interference with access to contraception. A 1974 decision, *Cleveland Board of Education v. LaFleur*, invalidated a school-board policy requiring pregnant schoolteachers to take an unpaid leave of absence beginning in the fourth or fifth month of pregnancy. Building on *Roe*, the Court declared that the due process clause protected an individual's right to choose whether to bear or beget children against undue state meddling. While the approach to reproductive issues taken in *Roe* and in *LaFleur* is not directly attuned to the issue of equality, its prohibitions of some restrictions on women's choices concerning contraception, abortion and pregnancy undeniably enhance women's status by giving them more control over the timing and frequency of childbearing, and limiting penalties on maternity.

A final case, seemingly unrelated to reproductive and sexual issues but really determined by them, is *Rostker v. Goldberg* (1981). In an opinion by Justice Rehnquist, the Court upheld the male-only draft registration law. The majority reasoned that since the draft is primarily to raise combat troops, there is no point in registering women, who are excluded from combat. Even the dissenting Justices did not question the exclusion of women from combat. The Court thus failed to confront the explosive issues lurking just beneath the surface of the registration law. Congress had been more forthcoming. The legislative debate on the law revealed that such considerations as sex in the foxholes and mothers being sent off to war while fathers stayed home with the children were very much on the lawmakers' minds when they decided to exclude women from registration.

The Burger Court's holdings on gender and affirmative action are a botched job. Affirmative action is compatible with equality when its purpose is to "bring up to the starting line" groups held back by discrimination. By definition, it is a temporary measure to permit artificially restricted groups to achieve equality, rather than a permanent accommodation to inherent difference or inferiority. Characteristically, affirmative action focuses on access to training, education, trades and professions rather than after-the-fact compensation for discriminatory lack of access. The Court, unfortunately, is prone to mistake sex-based legislation designed as a permanent accommodation to women's traditional role for affirmative action, and has upheld it.

To pick the most striking example, in *Kahn v. Shevin* (1974) the Court refused to strike down a modest property-tax exemption for Florida widows enacted before the turn of the century. All widows, rich or poor, as distinguished from widowers no matter what their economic status, were presumed destitute after the death of their spouse. The Court preserved a negligible economic benefit which failed to address the underlying causes of women's persistently inferior economic status. History is replete with laws that merely reinforced stereotypes while purporting to compensate for the disadvantages of life in the separate sphere. When the Court defines affirmative action in the sloppy way it did in *Kahn*, it does women no favor.

An equally serious problem is raised by legislation that does not, on its face, mandate different treatment of men and women but that has a substantially disparate effect on the sexes. The Supreme Court has tended to take a statute's neutrality at face value unless the challenger can establish that the legislature *intended* that it discriminate against one sex or the other. It is not enough that the impact is foreseeable and inevitable; legislators must have passed the law "because of, not merely in spite of" its effect on women.

The case that spelled this out, *Personnel Administrator of Massachusetts v. Feeney* (1979), upheld an absolute lifetime preference for war veterans in state civil service jobs, even though that preference resulted in an exclusively male work force at the higher levels of civil service employment in Massachusetts. The legislature's intention appeared to be a neutral one: to reward veterans for their service to the country. The devastating effect of such a rule on women, however, was obvious, given the 2 percent quota (lifted only recently) on women's participation in the military. The legislators, intent on rewarding the peculiarly male role of warrior by securing public benefits for the duration of a soldier's lifetime, were indifferent to this foreseeable effect. Moreover, they regarded a civil service that was male at the top and female at the bottom as part of the natural order of things. Indeed, the legislature exempted traditional low-paying "women's jobs" from the preference.

The Court's strict intent approach in equal protection cases is too limited to address the range of gender arrangements in society. Apparently neutral legislation is often embedded in social structures and driven by cultural assumptions that arrange, just as potently as overt gender and race classifications, the divisions that keep women and members of minority groups in their traditional places. A test focusing on effect has been successfully used in enforcing Title VII of the Civil Rights Act of 1964, which bars

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racial and sex-based discrimination in employment. Surely a similarly workable standard can be fashioned under the equal protection clause to make our laws truly neutral.

In the fifteen years since Warren Burger became Chief Justice, equal protection doctrine in sex discrimination cases has undergone a modest revolution. The "middle-tier" standard crafted by Justice Brennan has provided the impetus for overturning numerous laws that pigeonhole women as dependent homemakers and men as breadwinners. That change is obviously an important one, but it mainly signifies a recognition that the law must catch up with a changed world in which women have joined the work force in unprecedented numbers.

The most deeply embedded gender dichotomies retain their hold on the Court. Women may go to work and participate in the political process, but the Court draws the line at combat, the ultimate male preserve. Moreover, the powerful image of the duality of male and female sexuality, and the gender hierarchy that is part of it, provides the impetus for upholding sex-based legislation touching on sexuality. Pregnancy puts women outside the equality principle altogether, beyond judicial scrutiny, a result only partly, although importantly, mitigated by the doctrines of reproductive choice that have emerged during the Burger years under the due process clause.

Thirteen years after *Reed*, the big issues are decided: the earlier flood of decisions has diminished to a trickle. Reelection of President Reagan would almost certainly transfigure the Court and end its activism on the issue. Social reform would again be the province of legislatures which, for the first time in history, will feel the influence, in ways we cannot foresee, of the growing ranks of women members. □

NATIONAL SECURITY STATE

Never Question The President

MORTON H. HALPERIN

Prior to the emergence of the Burger Court as a distinctive judicial voice it was possible to argue that the Supreme Court had dealt in a responsible and relatively coherent way with the task of balancing the rights of individuals with the requirements of national security. It is no longer possible to do so. In a few broad and extraordinarily dangerous decisions the Court has swept away most of the limits established in earlier cases and has laid down a standard of extreme deference to the executive branch when it asserts that certain limits on constitutional rights must be accepted to protect the national security.

In cases involving the exercise of the nation's powers in the realm of foreign affairs the Supreme Court has historically been deferential to the political branches of the government and to their findings as to what is necessary to protect the country. Until recently, however, the Court was not willing to defer when constitutional rights were at stake. It was especially vigilant when the President was acting without a clear delegation of authority from Congress.

The record is not wholly commendable. The Court refused to strike down Abraham Lincoln's limitations on habeas corpus; it upheld the basic structure of the Japanese internment program during World War II; and it was slow to rein in the excesses of McCarthyism. Nevertheless, it blocked President Truman's efforts to seize the steel mills during the Korean War, upheld the right of Americans to travel abroad and limited the government's power to refuse to hire those it considered subversive or to strip draft dodgers of their citizenship.

Indeed, as late as 1977 it was possible to write, as I did with Daniel Hoffman in our book, *Freedom vs. National Security*, that the overall record of the Court was surprisingly sensitive to claims of civil liberties when juxtaposed with claims of national security. There was not a single case in which the Court had permitted the President, acting without clear Congressional authority, to override the fundamental rights of Americans. Even when the President was acting with Congressional sanction the Court had been unwilling to defer to the judgments of the political branches. Instead it made a searching inquiry to determine for itself if sufficient harm would result. Nowhere was this clearer than in the Pentagon papers case, *New York Times Co. v. United States*, in which the Court refused to accept at face value the government's claims that grave injury to the nation would result from release of the papers. Having listened to the arguments and read the secret briefs, a majority of the Court was not persuaded and would not order the newspapers that had copies to halt publication.

That decision, much praised by civil libertarians when it was handed down in 1971, was in fact the harbinger of a more deferential attitude toward national security claims. A majority of the Justices were clearly willing to contemplate situations in which they would approve a prior restraint on publication of information. Justices Byron White and Potter Stewart, who cast the swing votes in the case, demanded that at least in the absence of legislation, the government prove the publication would result in grave and irreparable harm to the national interest. However, as the government's efforts to suppress Howard Morland's 1979 story on the hydrogen bomb for *The Progressive* showed, even that standard permits stopping publication for a significant length of time while trial and appellate courts decide whether the government has met its burden of proof.

Finally, the dissenting Justices accepted the government's determination without any scrutiny whatsoever. In a little-

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noticed and now forgotten indication of what was to come, Justice John Marshall Harlan, speaking also for, Chief Justice Warren Burger and Justice Harry Blackmun, wrote:

> I agree that . . . the judiciary must . . . [satisfy] itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. . . . [It] may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. . . .
>
> But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

Today, that dissent clearly commands the support of the majority of the Court. We are just beginning to experience the full weight of this profound change. Four decisions reflect the Court's sharp break with the past.

The manner in which the Court disposed of the first of these cases, *Snepp v. United States*, in 1980, showed its utter disdain for the basic principle that had guided the Court in dealing with this issue in the past: unless based on legislative authority, claims to limit constitutional rights on grounds of national security would be rejected.

Frank W. Snepp, a former Central Intelligence Agency operative, published a book, titled *Decent Interval*, about the C.I.A.'s activities in Vietnam. The agency sought damages because he failed to clear the manuscript, and it asked the Court to impose a requirement that he submit all future writings for review before publication. The Court was so little troubled by the absence of any statutory basis for the C.I.A.'s action that it decided the case without benefit of briefs or oral arguments. It did not deal in any serious way with the separation-of-powers issue raised by the lack of Congressional authorization. Even the First Amendment prohibition on prior restraint was dismissed in a brief footnote:

> When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure". . . . Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest.

The second opinion marking the Court's radical departure from established law came a year later, in another case relating to a former C.I.A. official. In *Haig v. Agee* the Court showed no interest in finding a narrow way to uphold the government's contention that it had the authority to remove Philip Agee's passport to keep him from traveling to Iran. The executive branch claimed the right to limit an American's foreign travel whenever the Secretary of State determines such travel is "likely" to damage U.S. national security or foreign policy.

Conceding that some delegation of power from Congress was necessary, the Court found it in Congress's *failure to act* following a few scattered and ill-publicized cases in which passports were denied on national security grounds. In so doing the Court ignored—as it was to do again in last term's Cuban travel case, *Regan v. Wald*—a 1977 amendment to the Passport Act that severely limits the executive branch's power to curtail travel.

Once it had established Congressional authorization, the Court was unwilling to balance the proposed restriction on Agee's First Amendment rights against the possible harm of his trip. It simply declared, contrary to the decision in *Kent v. Dulles* (1957), that there was no such right. Thus the Secretary of State is free to deny passports for any travel that he believes is likely to injure national security or American foreign policy, as he defines it.

The full import of the *Agee* decision was made clear by Justice William Rehnquist, writing for the majority in *Regan*. Taking some language from a 1965 decision out of context, he held that free speech is involved only if restrictions are based on the beliefs of the would-be traveler. If the government denies a passport to someone who wants to go to a country to find out what is going on there, the First Amendment is not at issue. So much for the right to know.

Rehnquist then gave short shrift to the Fifth Amendment right to travel. It is "insufficient to overcome the foreign policy justifications supporting the restriction," he wrote. Neither the citizen nor the courts can challenge the government's evidence of the need or value of the restriction in support of foreign policy objectives—"given the traditional deference to executive judgment." Rehnquist seems not to know or care that there is no precedent for such deference in cases relating to constitutional rights.

The final case in this brief but devastating list also illustrates the Court's unwillingness even to take account of legislation designed to limit the powers of the President in relation to national security. Just as Rehnquist did not think Congress's amendment to the Passport Act was relevant to a travel case, so he ignored the 1974 amendments to the Freedom of Information Act [see sidebar] in his opinion for the Court in *Weinberger v. Catholic Action of Hawaii/Peace Education Project* (1981). The Court merely accepted the government's assertion that it could not confirm or deny the presence of nuclear weapons at a particular location on the ground that the information was classified. In so doing, it ignored a provision of the F.O.I.A. that requires courts to determine on their own whether information is properly classified. It did not insist on the assurance of a senior official, as Justice Harlan would have required in the Pen-

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tagon papers case, let alone the proof that a judge finds persuasive, as the F.O.I.A. clearly demands.

The recent decisions of the Burger Court in national security cases add up to this: If the executive branch asserts that injury to the nation's foreign policy would result from the actions of its citizens, the Court will accept that judgment without any independent inquiry. Moreover, it will accept the President's definition of what needs to be done to avoid the injury without making its own determination of whether that is the least intrusive means. Finally it will permit the President to act without Congressional authorization or it will, if necessary, stretch a point to find that authorization.

The trouble we face is underscored by Justice Lewis Powell's dissent in the Cuban travel case, in which he warned his colleagues that their job was to determine what the law is and not what they think would be good policy. Anyone who would defend these decisions as signaling an end to judicial activism needs to contend with his clear and brief dissent:

> As the Solicitor General argues, the judgment of the Court may well be in the best interest of the United States. The regulations upheld today limit Cuba's ability to acquire hard currency, currency that the Executive has found might be used to support violence and terrorism. Our role is limited, however, to ascertaining and sustaining the intent of Congress. It is the responsibility of the President and Congress to determine the course of the nation's foreign affairs. In this case, the legislative history canvassed by Justice Blackmun's dis-

THE SUPREME COURT AND THE FREEDOM OF INFORMATION ACT

In 1966 Congress passed the Freedom of Information Act, the first significant Federal open-government statute. Its purpose is to give the public access to the records of the executive branch, except for those that fall into nine narrow categories exempted by Congress.

The Supreme Court first decided an F.O.I.A.-related case in 1973, after four members of the Warren Court had been replaced. It has now ruled on eighteen such cases. One word describes the Court's attitude toward attempts to pry loose government documents: hostility.

The numbers tell the story better than anything else. From them can be gleaned three useful rules of thumb.

§ The opponents of disclosure almost always win. Of the eighteen decisions, the government's position opposing disclosure has prevailed in fourteen. In another case, the Court ruled for the government on the principal issue and for the requesting party on a far less significant aspect. In two other cases, industry intervened to prevent the government from disclosing documents requested by private parties, in one case completely, and in the other in substantial part. In only one case, involving the records of disciplinary violations at the Air Force Academy, with the names and identifying details of the individual cadets deleted, did the government's attempt to block disclosure fail.

Thus, the government prevailed in fourteen and a half and lost in three and a half cases, giving it a batting average of .806. If you look only at the Court's disclosure-versus-nondisclosure record, the side seeking to withhold records lost only one and a half of the eighteen cases, for a batting average of .917—pretty good in any league.

By contrast, when Congress has reviewed the results of F.O.I.A. decisions, it has always acted to promote greater disclosure. Thus in 1974, the year after the Supreme Court ruled, in *Environmental Protection Agency v. Mink*, that the courts may not question the denial of F.O.I.A. requests based on national security grounds, Congress reversed that ruling, as well as several other appellate court decisions that gave agencies blanket authority to withhold law-enforcement records. And when the Court decided in *Administrator, Federal Aviation v. Robertson* to give an expansive reading to the F.O.I.A. exemption incorporating other nondisclosure statutes, Congress promptly overturned that too. Congress is once again considering F.O.I.A. amendments which, many agree, would increase disclosure.

§ The Court is likely to hear an F.O.I.A. case only if the government brings the appeal. Since the act was passed, the government has sought review in nineteen cases, and it has been granted in seventeen, or 90 percent of the time. This is extraordinary compared with the rate of about 5 to 7 percent in all cases. It is substantially better than the rate for all government cases, where the Solicitor General is granted 70 to 75 percent of his requests for review.

§ The only way an F.O.I.A. requester can get the Court to take a case is if the government also wants review. In three cases in which requests for review *were* granted to nongovernmental parties, the appellants were all *opposing* disclosure; in two of them the government supported the position opposing disclosure, although it did not file its own petitions.

In only three cases was an appeal granted to persons seeking disclosure, and all involved special circumstances. In each instance the government had either filed its own petition in the case or was petitioning the Court on an identical or closely related issue. In no case lacking special circumstances of some kind has an F.O.I.A. requester been able to persuade the Supreme Court that an appellate court ruling opposing disclosure should be reviewed. Although the number of cases in which review has been sought by a requester is not readily available, it probably runs somewhere between fifty and one hundred.

ALAN B. MORRISON

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senting opinion unmistakably demonstrates that Congress intended to bar the President from expanding the exercise of emergency authority under Sec. 5 (b) [claimed by the President].

In 1967, in a case striking down a statute making it unlawful for a member of the Communist Party to work in a defense plant (*United States v. Robel*), the Court pointed out that claims of national security cannot be invoked as a "talismanic incantation" to support any exercise of power that would violate constitutional rights. Two decades later such claims do, in the eyes of this Court, sweep everything before them. □

FREEDOM OF THE PRESS

A Tale of Two Libel Theories

SIDNEY ZION

In law as in love, the surest way to know how far you've fallen is to see what picks you up. In April the press won a victory in the Supreme Court in a case brought by a manufacturer of stereo systems against Consumers Union, the publisher of *Consumer Reports*. From the rapturous treatment accorded the decision in the press one would think the ruling was a breakthrough victory for First Amendment rights

In fact, the decision was nothing of the sort. It merely reaffirmed a rule of twenty years' standing that in cases involving First Amendment rights, appellate courts will look closely to insure that those rights are not tread on.

That the press crowed mightily about its success, however, was hardly surprising. It was the first press win in a libel case in the Supreme Court in ten years. In fact, journalists' praise for the decision came less from joy than from relief. For a change, the Burger Court had not done them in.

The First Amendment has known plenty of troubled times, but what an awesome trashing it has suffered at the hands of the statists who control the Supreme Court.

Reporters jailed for refusing to disclose confidential sources. Newsrooms fair game for police ransacking. Telephone records secretly subpoenaed by law-enforcement officials on the hunt for reporters' sources. Journalists' inner thoughts and discussions with editors and colleagues opened for discovery by libel plaintiffs. Courtrooms closed by judicial fiat to press and public.

All that, and more, in a period of relative tranquillity. No Alien and Sedition Acts here, no Joe McCarthy there. Is it coincidence that the Burger Court hit its stride after Watergate, just when journalism was getting its best press from the citizenry, in best-selling books and in movies?

None of this would have happened under Earl Warren. Indeed, had only Justices Hugo Black and William Douglas continued to serve throughout the Burger years, the press would have won every case it has lost before the High Court. So much for the Supreme Court as Institution.

So much, too, for the impartial application of legal principles by a majority that promotes itself as "conservative" and "strict constructionist." What the Burger Court looks for is the identity of the defendant. Here are a trio of cases—out of many—that tell the tale.

In 1976, Justice William Rehnquist, writing for a five-man majority in *Paul v. Davis*, held that a person's good name and reputation are not protected by the Constitution.

In that case, Edward Charles Davis 3d had been arrested for shoplifting by a private security guard in a store in Louisville, Kentucky. Davis, a photographer for *The Louisville Courier-Journal & Times*, had pleaded not guilty; the charge had been "filed away with leave to reinstate," meaning the police never intended to prosecute. Seventeen months later, the police chiefs of Louisville and Jefferson County, Kentucky, sent out a flier to area merchants containing mug shots and names of "active shoplifters." Davis's picture and name appeared in the flier, though he had not been tried on the charge and had never been convicted of a crime.

Six days after the flier was distributed, the shoplifting charge against him was dismissed in court. The next day, Davis filed suit in Federal court against both police chiefs. He sought damages, an injunction against further dissemination of the flier and an order that the chiefs retrieve all copies of the flier and instruct the merchants who had received them that Davis was not a shoplifter.

Davis based his action on a Federal statute providing redress to persons whose constitutional rights are violated by those acting under "color of law"—that is, acting under the authority of their office. The chiefs conceded that their conduct had been intentional and had been undertaken in their official capacity. The Court had to decide whether Davis had been deprived of liberty or property without due process of law.

"We hold," wrote Rehnquist, "that the interest in reputation asserted . . . is neither 'liberty' nor 'property' guaranteed against state deprivation." Therefore, "however seriously" the flier may have harmed Davis's reputation, he had no recourse under the statute because reputation itself was not a protected constitutional right.

It is interesting to compare that reasoning, which Justice William Brennan termed "frightening for a free people," with Rehnquist's opinion for the Court three years later in *Wolston v. Reader's Digest Association*.

In 1958, Ilya Wolston pleaded guilty to criminal contempt for failing to respond to a subpoena directing him to appear before a Federal grand jury in New York City. The grand jury was conducting a major investigation into the activities of Soviet intelligence agents in the United States. Wolston received a one-year suspended sentence and was placed on probation for three years; a condition of the probation was

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that he would cooperate with the grand jury in any further inquiries regarding Soviet espionage.

In 1974, the Reader's Digest company published a book titled *KGB: The Secret Work of Soviet Secret Agents*. The book contained a passage that identified numerous alleged Soviet agents operating in the United States after World War II. Wolston's name appeared in that passage, which explained that those listed had been "convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments."

Wolston sued for libel. The Federal District Court in Washington, D.C., threw out the complaint on the ground that Wolston was a "public figure" and so had to prove "actual malice" to recover. While agreeing that the book appeared to state falsely that Wolston had been indicted for espionage—his contempt conviction did not follow an indictment—the Court held that the First Amendment precluded damages because it was clear that the falsehood was not made with "reckless disregard of whether it was false or not"—that is, with actual malice. The Circuit Court of Appeals affirmed.

But the Supreme Court reversed, per Justice Rehnquist, in an opinion so concerned for the right of privacy you'd think it had been written by Justice Louis Brandeis.

After allowing that Wolston's conduct was "newsworthy"—it had been the subject of fifteen stories in the New York and Washington press—and that Wolston had later been identified as a Soviet agent in two other publications, Rehnquist nevertheless held that Wolston had not become a "public figure." The reason: he had not "voluntarily thrust" himself into the investigation but was "dragged unwilling" into it by the government.

Characterizing Wolston's conviction as a "mere citation for contempt" followed by passive acceptance of punishment, Rehnquist wrote, for a six-man majority:

> We find no basis whatsoever for concluding that Wolston relinquished, to any degree, his interest in the protection of his own name. This reasoning leads us to reject the further contention that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction. To hold otherwise, would create an "open season" for all who sought to defame persons convicted of a crime.

Whatever one may think of Rehnquist's sensitivity to the rights of criminals, it takes some doing to think of Wolston without thinking of Edward Charles Davis 3d of Louisville.

Davis, an innocent man who was branded a criminal by police officers who admitted they knew better, could not collect damages for harm that, the Court majority conceded, was done to his good name. Wolston, who pleaded guilty, is entitled to collect from a publisher and an author who, at most, negligently overstated the grounds of his conviction.

Taken together, the two cases stand for the proposition that so far as the Constitution is concerned, the press may not, in good faith, defame convicts, while government officials may, in bad faith, defame the innocent.

It is a hard combination to follow, but the Burger Court was equal to the challenge. On the day *Wolston* was decided, the Court, again per Rehnquist, ruled, in *Baker v. McCollan*, that a person who is falsely imprisoned is not deprived of a right that is "secured by the Constitution."

Linnie Carl McCollan was stopped for running a red light in Dallas; he was then arrested and held in jail eight days on a bail-jumping charge in a narcotics case. Despite his repeated protests that he was a victim of mistaken identity, the authorities did not bother to check the file. When they finally did, the prints and mug shots showed he was indeed the wrong man. The guy the cops wanted turned out to be his brother.

Linnie McCollan sued under the same statute that Davis had used against the Kentucky police chiefs—with the same result. The Burger Court ruled that McCollan had failed to

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satisfy the "threshold requirement" of the statute because he had not been deprived of liberty without due process of law, as the Court defined the constitutional meaning of that phrase.

In dissent, Justice John Paul Stevens—jointly with Justices Thurgood Marshall and William Brennan—noted that under the theory of the majority, McCollan would not have been entitled to release through a writ of habeas corpus, "since his detention is not a violation of his constitutional rights." Of course, a newspaper would have been subject to punitive damages in a libel suit if, under similar circumstances, it had accused the wrong man of a crime.

Likewise, had Davis been called an "active shoplifter" or even a "former shoplifter" by the press, or for that matter by an ordinary citizen, he would have had a right to money damages that could have reached astronomical figures if the defamation was intentional and therefore "malicious."

False imprisonment and official stigmatization are surely more harmful than defamation by the news media, and they are obviously far worse than slander by a private person. Yet the Court held that one's interest in freedom and reputation, while not protected by the Constitution, are, nonetheless, sufficient to overcome the First Amendment's prohibition against any abridgment of freedom of speech or of the press.

If that's not statism, what's statism? □

FEDERAL REGULATION

Close Reins on The Bureaucracy

ALAN B. MORRISON

Regulation, which Ronald Reagan attacked at every opportunity on his way to the White House, remains very much a fact of American life nearly four years after he became President and fifteen years after Warren Burger replaced Earl Warren as Chief Justice of the Supreme Court. Whatever the Burger Court may have done in other areas, it has had only a modest effect on the course of regulation.

In this article, I will use "regulation" to describe only actions by the Federal government through decisions of administrative agencies that either prevent a person (often, a business) from doing what he or she would like to do, or that permit the person to do something someone else opposes, or that make the right to do something conditional on meeting certain requirements; what I call regulation cases will not include challenges to the constitutionality of statutes.

The paradigm regulation case involves the industrial polluter. The Environmental Protection Agency regulates when it (1) controls the amount of some kind of emission; (2) permits a plant to operate without any change; or (3) allows a plant to continue operation on the condition that it install equipment to control the emission. A court challenge to the first regulation would come from the company; to the second, from concerned citizens; and to the third, from either or both, claiming that the conditions were too strict or too lenient. The Supreme Court's role in regulation is defined by the degree of deference it shows to the decision-making agency as compared with its willingness to impose, or, more precisely, to construe the governing statutes as imposing, various restraints on the agency. To the extent that it overrules an agency, the Court, instead of the agency, can be said to be regulating.

In one important respect the Supreme Court's role in regulation differs markedly from its role in other areas. While it is usually easy to tell the winners from the losers in cases involving government regulation, the long-term benefits of many of the Court's decisions in this area are harder to predict, because its rulings are generally procedural and because different interest groups shift sides in different cases depending on what best serves their substantive interests.

For example, an industry trade association might decry the denial of a hearing in one case while applauding the same agency in another case for denying the same kind of hearing, simply because in the first case the industry did not get what it wanted and in the second it did.

In contrast with the lower courts, and in contrast with other areas covered in this symposium, the Supreme Court has decided relatively few regulation cases in the past fifteen years that have had any effect beyond that on the specific agency and, often, the specific statute at issue. Only those decisions with broad impact will be discussed here. The questions they address fall into three general categories: the extent to which the Court has kept open its doors to challenges; the extent to which the courts should defer to the agencies; and the right of the courts to impose procedural requirements on the agencies to improve their decision-making processes.

Opening the Courthouse Doors

One of the surest ways to provide for unlimited administrative discretion is to close the courthouse door to those who seek to challenge agency decisions. The labels under which cases are thrown out include such picturesque examples of legalese as "standing," "committed to agency discretion" and "preclusion." They all have one clear message: no matter how wrong the agency was or what law was violated, it is not up to the courts to fix the problem. Such acceptable lawlessness generally has been rejected by the Supreme Court in the last fifteen years. The law of standing—who, if anyone, has the right to go to court to test the legality of an agency decision—has been the principal focus in this area, and the Burger Court has established that most agency decisions are subject to some kind of judicial review. That could not have been said with confidence in 1969.

The case that paved the way for consumer and environ-

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mental groups to sue Federal agencies, *Association of Data Processing Service Organizations v. Camp*, was brought that year by an industry group that thought the Comptroller of the Currency was not adequately regulating banks in their nonbanking activities. The Court announced a test for standing that requires a showing of injury to the plaintiff, a causal connection between the injury and what the agency did or did not do, a likelihood that the injury can be redressed by the Court and a showing that the interest the plaintiff seeks to vindicate is "arguably within the zone of interest" protected by the statute in question. Like most standards, its application is not easy, but in most cases the doubts have been resolved in favor of the plaintiff.

One particularly helpful application of the *Data Processing* test for environmental and consumer groups came four years later in *United States v. SCRAP*. There the Supreme Court found that while the harm to individual plaintiffs was small, it was sufficient to enable them to attempt to prove their case (which they were eventually unable to do). As a result, the amount of harm an individual has suffered or may suffer is no longer a barrier to suing Federal agencies.

Standing has been a barrier, however, in challenges to the Internal Revenue Service's enforcement of the tax laws. In 1976 in *Simon v. Eastern Kentucky Welfare Rights Organization*, and this year in *Allen v. Wright*, the Supreme Court refused to hear suits by poor people challenging a relaxation of I.R.S. rules requiring hospitals to give free care to the indigent in order to be eligible to receive charitable contributions, and by black parents objecting to the I.R.S.'s nonenforcement of rules against tax-favored private academies that practice segregation.

Those decisions can be read as simply rejecting the broad challenges and insisting on narrow, specific allegations of harm to named individuals as a direct result of the I.R.S.'s actions. Indeed, *Simon* has been a real problem only in the tax field, where the courts have always been solicitous of the I.R.S.'s policy determinations. The solicitude is partly because it is the tax status of third parties that is ultimately at issue. That inevitably makes the cases more complex and raises serious privacy issues which are avoided by peremptory dismissals on a ground like standing. Since the Court in both cases eschewed potentially broader grounds for dismissal, more carefully drafted allegations and better choices of plaintiffs may obviate some of these problems.

Another claim often used by administrative agencies to shut the courthouse door is that Congress intended the agencies' decisions to be discretionary and unreviewable. The claim had little success in the Warren Court, which allowed the defense only in those cases in which the Court finds evidence that Congress intended to cut off access to the courts, a result that rarely, if ever, obtains.

The Burger Court has responded similarly. In 1975, when union members sued the Secretary of Labor for not seeking to overturn a union election which, under the National Labor Relations Act, only the Secretary may do, the Court, in *Dunlop v. Bachowski*, found that the Secretary's decision not to sue was reviewable in court, albeit under a very deferential standard.

The third door-closing defense that the government trots out in almost mechanical fashion is preclusion. This means Congress has decided that certain agency decisions are not subject to judicial review or that certain categories of people may not bring those cases. That argument has generally met with little success in the last fifteen years, although this past term the Court unanimously ruled, in *Block v. Community Nutrition Institute*, that consumers were precluded from challenging a decision of the Department of Agriculture that made it economically impossible to produce reconstituted milk in many areas of the country. It seems unlikely, however, that this decision will have much impact outside the purview of agriculture.

To a considerable extent, therefore, the courthouse doors have opened up in the past fifteen years to challenges to decisions by administrative agencies. Despite some setbacks, only the most pessimistic observer could find in the decisions any reason to suspect that the trend will be reversed.

Deference to Agency Decision-Making on the Merits

Because Congress has told the courts generally to defer to agency decisions and because the courts recognize both that they cannot hope to master the technical issues and that Federal judges are not chosen to make policy, judges give agencies considerable leeway when reviewing their decisions on the merits. Quite obviously, such deference must have limits or else judicial review would be meaningless, a result which Congress did not intend. One of the struggles of the past fifteen years has been about where to strike the balance between deference and abdication.

Congress has provided that agency decisions turning on questions of fact or on policy choices are to be upheld unless they are "arbitrary and capricious," a not entirely self-evident phrase. Beginning in 1971, in *Citizens to Preserve Overton Park v. Volpe*, involving a challenge to a decision to permit a highway to go through a park in Memphis, Tennessee, the Burger Court made it clear that the lower courts should make a searching review of the evidence, that they should be certain that the legally relevant factors (and only those factors) were considered and that they must insist that agencies give a rational explanation for their decisions consistent with the statutory requirements. At the same time, the Supreme Court left no doubt that it did not intend lower-court judges to second-guess agencies just because they would have reached a different outcome.

In two rulings, one favoring the position of industry and the other rejecting industry's claims, the Burger Court has emphasized that Federal judges should not rubber-stamp agency decisions. In 1980 in *Industrial Union Department v. American Petroleum Institute*, the Court concluded that the Occupational Safety and Health Administration had not properly established that there was a "significant risk" of exposure to benzene, which the law required in order to issue a standard to protect workers. While the ruling turned in part on the meaning of the Occupational Safety and Health Act, the decision made clear that evidence, not merely conclusions, is necessary before regulations will be sustained.

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The true test of whether the Burger Court would insist on rational justifications for agency decisions came three years later in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* There, the U.S. Court of Appeals in Washington had overturned a Reagan Administration decision jettisoning a 1977 rule mandating air bags or seat belts in automobiles. In a decision that surprised many observers, the Supreme Court unanimously ruled that the agency had acted arbitrarily in failing to consider one option to total revocation and, in a 5-to-4 vote, agreed that another alternative had also been dismissed out of hand. The ruling was particularly significant because the Court applied the same test when considering deregulation that it had used in determining the validity of the regulation in the first place: both require evidence and reasoned explanations. Thus, the Court made it plain that lower courts would not be automatically reversed if, after a careful review of the record, they had found an agency's decision to be irrational. While the standard is still highly deferential, the rulings in the benzene and air bag cases establish that there are limits beyond which an agency cannot go without its decisions being overturned on their merits.

Another area in which agencies ask for deference is in their interpretation of the statutes under which they operate. While generalizations in this area are not easy to make, recent Supreme Court rulings leave the impression that the Court defers when that helps it reach the interpretation of the statute the Court finds proper, and declines to do so when deference would lead to the opposite conclusion. Indeed, most of the Court's opinions on this question, such as *Federal Election Commission v. Democratic Senatorial Campaign Committee* in 1981, have something for everyone to cite.

The high point of these mutually exclusive lines of authority occurred in June in two cases (both named *Securities Industries Association v. Board of Governors of the Federal Reserve System*) brought by the securities industry against the Federal Reserve Board, challenging the Fed's decisions allowing banks to enter into nonbanking activities. The Supreme Court ruled for the agency in the first case, relying on deference to the agency's interpretation of its statute when upholding its actions, and against it in the other, declining to defer when disagreeing with the board's interpretation of its Congressional mandate.

Imposing Procedural Requirements

In the late 1960s and early 1970s, when courts began to review agency decisions with increasing frequency and skepticism, they were often reluctant to overturn decisions on their merits. Instead, they looked for, and often found, flagrant violations of statutory requirements to give notice, to have a hearing or to consult with persons outside the affected industry.

Eventually, agencies began to follow the procedures set forth in their own statutes and regulations, although even today they do not always do so. The courts nonetheless ex-

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pressed concern that the processes being followed did not always produce the kind of record or reasoned decision necessary to decide difficult questions. At the behest of both industry and its opponents (in different cases, of course) the courts began imposing procedural requirements on agencies beyond those contained in the statutes.

In 1978, however, the Supreme Court stepped in and slowed this trend considerably, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.* The Federal Court of Appeals in Washington had accepted an argument made by environmental groups that the Nuclear Regulatory Commission should conduct further hearings on a highly technical and controversial policy issue. In no uncertain terms, a unanimous Court told litigants and lower-court judges that it is up to Congress, not the courts, to decide what procedures are necessary and proper.

The *Vermont Yankee* philosophy is underscored by two other Burger Court rulings—one predating *Vermont Yankee*, the other following it—both of which narrowly construe the relevant statutes in deciding whether certain procedural requirements have to be followed. In the earlier case, *United States v. Florida East Coast Railway* (1973), the Court concluded that informal rather than formal proceedings were all that Congress had dictated, adopting a plausible but by no means compelling reading of the law. In the other case, *American Textile Manufacturers Institute v. Donovan* (1981), in a significant blow to industry, the Court refused to read into the same Occupational Safety and Health Act that it had construed in favor of industry the year before in the benzene case, a requirement that the agency engage in a cost-benefit analysis before issuing health and safety standards. With *Vermont Yankee* these cases present a clear message from the Court: We will not assume that Congress intended us to tie an agency's hands in procedural knots unless it makes very clear that it wanted us to do so.

Three Precepts of Judicial Review of Regulatory Actions

From this survey of the relatively modest number of Burger Court decisions having broad impact on the manner in which courts review decisions of administrative agencies, three precepts emerge with some degree of certainty:

§ You can almost always get into court and have it review your claim that an agency acted improperly.

§ The court will review your claim and the agency's decision with care, but you have a decidedly uphill road to convince a court that the agency was wrong on the facts or in resolving policy choices. However, in exceptional cases, the courts will set aside an agency's decisions on the merits.

§ The courts will insist that agencies dot their procedural i's and cross their procedural t's, but only those i's and t's that are required by law and not those that the judiciary thinks would be a good idea.

A Final Note

The decision that is likely to have the greatest impact on regulation-making is outside the scope of this article. Last

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year, in *Immigration and Naturalization Service v. Chadha*, the Supreme Court ruled that the legislative veto, in all its manifestations, is unconstitutional. Until then, Congress had shown an increasing proclivity to use the veto to prevent what it saw as agency excesses (though others suggested the legislators' zeal was prompted by special-interest groups calling in their campaign chits to prevent unwanted regulations). There is no doubt that had the Court not acted, Congress would have stepped up the use of the veto, including perhaps making a veto procedure of some kind applicable to all agency rules, and perhaps other decisions as well. That threat is past, and if the legislative branch wants to rein in the executive, the Supreme Court has told it that it will have to find some other means of doing so. □

ANTITRUST ECLIPSED

'Efficiency' Over Competition

JERRY S. COHEN AND
HERBERT E. MILSTEIN

All judges, the late Federal Judge Braxton Craven maintained, are result oriented—the only difference between them being that some know it and some do not. In antitrust and securities law, his observation is particularly pertinent. On the Warren Court, the leaders in antitrust law were Justices Hugo Black and William Douglas. Both were realist-populists, and they viewed the antitrust laws not only in economic terms but with insight into the social and political factors responsible for the laws' enactment at the end of the nineteenth century: the pressures generated by the populist and progressive movements, with their profound concern about the political and social implications of the giant corporate combinations.

"Competitive equality" was the hallmark of the Warren Court. Black and Douglas believed, indeed deeply felt, that one of the purposes and desirable results of the antitrust laws was the protection of small business; that to have effective competition, it was necessary to have significant competitors. The Warren Court, therefore, embraced an expansive view of antitrust policy, with emphasis on easing the burden of plaintiffs in successfully litigating suits against defendants.

The Burger Court has shown disdain for "competitive equality" and all it connotes. This disdain is rationalized under the euphemism "economic efficiency." Antitrust policy in the Burger Court is a triumph for the Chicago school approach to economics, with its emphasis on allowing the marketplace to make all decisions unencumbered by regulations.

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To a Chicago school theorist like former Assistant Attorney General William Baxter, a practice of big business like predatory pricing—charging below cost in order to drive out competitors—simply does not exist because from a strictly economic point of view, such prices do not produce maximum profits. The inconvenient reality that such practices do occur is irrelevant.

Because of its particular results-orientation, the Burger Court has become largely a defendants' court. In various areas of the antitrust laws, the Warren Court gave wide application to per se illegality—certain practices were considered illegal without regard to their particular effects, or the claimed justification for them. As a result, the parameters were narrowly defined and antitrust cases kept within manageable limits. This approach rested on the belief that certain conduct was inherently and perniciously anticompetitive. The Burger Court, on the other hand, has adopted, except in certain narrow areas such as horizontal price-fixing, a rule-of-reason analysis, which weighs purported gains in efficiency against a harm to competition. This opens the corral to a thundering herd of economists, making it more difficult for plaintiffs to bear their evidentiary burdens.

The merger area is one of the most important where these differences in approach have resulted in market behavior totally inconsistent with the purposes of the antitrust laws. The Warren Court, in early cases, adopted a tough standard for mergers in order "to arrest this rising tide toward concentration into too few hands and to halt the general demise of the small businessman." While the Burger Court's position on mergers is still not defined, it has already indicated that it will employ a much broader range of economic data in determining the impact of a merger.

Of more significance is the Burger Court's signal that it is prepared to look only to purported economic efficiencies—claimed cost savings and the like—in deciding whether mergers or other potentially anticompetitive business tactics are legal. The results are what one would expect. The most massive mergers in the history of the nation are proceeding unchecked. The largest corporations in the world, Texaco, Du Pont and others, are proceeding unabashedly with mergers of a size that makes those prohibited by the Warren Court appear minuscule, apparently without fear of either the Justice Department or the Supreme Court.

In praising the Burger Court, Richard Posner, a major Chicago school economic theorist and now a Circuit Court of Appeals judge, as well as one of the strongest critics of the Warren Court, has stated, "The underlying notion that the antitrust laws express the political values of Jeffersonian democracy rather than economic values rooted in efficiency, also is gone." So it is.

What the Burger Court ignores is that the antitrust laws are not regulations in the ordinary meaning of the term. Rather, they are ground rules designed to keep the free enterprise system free. A system that is not concerned with the survival of individual competitors becomes increasingly concentrated in the hands of a few large corporations. Justices Black and Douglas wished to keep the enterprise system free

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from the private restraints that inevitably flow from the domination of an economy by a few companies. The law of supply and demand does not work effectively when it can be manipulated by those with the economic power to do so.

In the corporate securities field, the results-orientation of the Court is equally clear. The Warren Court had an expansive view of the securities laws and their basic purposes. Passed in the early 1930s to prevent fraud and unfair practices in the manipulation of the market for stocks, bonds and other securities, those laws were interpreted to protect the investing public from such frauds as insider trading and the false prospectus. In the mid-1960s, the Supreme Court embraced the concept that private enforcement of Federal securities laws through suits by victims of illegal practices provides a necessary supplement to the Securities and Exchange Commission. As late as 1967, the Court was seeking to bring under the protection of the Federal securities laws investments that many thought were not considered securities under the statutes.

The Burger Court has largely ignored or redefined these concepts in order to achieve the results its conservative majority wants. Its securities-law opinions have often been highly restrictive, indeed, in some cases, vindictive. Its rhetoric has shown a marked change and antipathy to any kind of expansive reading of Federal securities laws. For example, in a 1975 opinion Justice William Rehnquist spoke at great length about "the danger of vexatious litigation," "the potential for nuisance or 'strike' suits" and "the potential for possible abuse of the liberal discovery provisions of the Federal Rules."

In its drive to weaken those laws, the Burger Court has reexamined the very areas in which the Supreme Court had expanded the ability of injured parties to seek redress in Federal courts. Building on claims that the courts were overcrowded, that access to the Federal courts should be limited and that state courts should be used as far as possible, the Burger Court has narrowed the reach and effectiveness of the securities laws. In 1975, in *Blue Chip Stamps v. Manor Drug Stores*, the Court severely restricted access to the Federal courts to victims of securities fraud. The next year, in *Ernst and Ernst v. Hochfelder*, the Court generally limited the protections of the securities laws to those who could present an unusually high degree of proof. And in 1980, in *Chiarella v. United States*, the Court limited the legal dangers of trading on inside information.

The dissenting opinion of Justices Harry Blackmun and William Brennan in *Ernst* summed up where the Burger Court was going: "Once again . . . the Court interprets § 10(b) and the Securities and Exchange Commission's Rule 10b-5 [which prohibit fraud in corporate publications] restrictively and narrowly and thereby stultifies recovery for the victim." This is in sharp contrast to the Warren Court, which interpreted the Federal securities laws "not technically and restrictively, but flexibly to effectuate its remedial purposes," as in *Securities & Exchange Commission v. Capital Gains Research Bureau* (1963).

The fundamental function of the law, McGeorge Bundy once asserted, is "to prevent the natural unfairness of society from becoming intolerable." This certainly was the moving philosophy of the Warren Court. It most certainly is not a significant concern of the Burger Court. □

THE RIGHTS OF LABOR

Showing Workers Who's the Boss

ARTHUR FOX

The rights of workers vis-à-vis their employers under the National Labor Relations Act, and as union members under the Landrum-Griffin Act, depend heavily on the judicial process because those laws are so vague. While the Burger Court has occasionally upheld the rights of individual employees, workers have been the losers overall. Even in cases where employees were technically the winners, their victory often came at the expense of their unions, thus weakening their collective strength. All told, the employer has finished first in the Court's standings; unions, second; and employees, last.

The Burger Court has not radically changed the fundamental principles established by the Warren Court with regard to labor contracts and their enforcement; however, it has extended some of those principles in a manner that impairs the workers' opportunity to remedy violations.

Unions are concerned primarily with the collective rights of workers. When an employer unjustly terminates or otherwise discriminates against an individual, the union, which functions like a state's attorney in deciding what grievances to prosecute, may choose not to press the grievance for reasons unrelated to the merits of the case. For example, union officials biased against the complaining worker, perhaps because he or she is a threat to their re-election, may be as anxious as the employer to be rid of the person and may sabotage the grievance procedure. Because the law requires employees to exhaust their contractual grievance procedures before going to court and because courts are usually required to defer to grievance awards, the employee is up the proverbial creek.

In a famous 1967 decision, *Vaca v. Sipes*, the Warren Court recognized this injustice and created what it called a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law." If the individual worker could prove that his or her grievance had not been prosecuted because of union animus or serious malfeasance, the employee's breach-of-contract claim against the employer could be heard and resolved by a Federal court. The Burger Court subsequently extended that ruling to situations in which the union had pressed the grievance to arbitration but

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had not fairly represented the worker in that proceeding. In a 1976 case, *Hines v. Anchor Motor Freight*, the Court held that if the worker could demonstrate that the union had failed to provide fair representation in the arbitration proceeding, the award would be invalidated and the employee granted a hearing.

Employers cried, Foul. After *Hines*, they came out from behind the unions' skirts and mounted an attack on the *Vaca* principle, complaining that their potential liability to unlawfully terminated employees could multiply because of delays in adjudicating contract claims. Employers argued that they had bargained for an expedited arbitration process to resolve such claims and should not have to pay damages that accrued either after unfair hearings or after a union failed to go to arbitration.

Last year a 5-to-4 majority of the Court embraced that view. In *Bowen v. United States Postal Service*, the Court ruled that the lion's share of back pay awarded to employees who sued for wrongful discharge and won could be assessed against their union, even though the union had nothing to do with the firing. (The employer's argument had been rejected by every appeals court that had considered the matter.)

Individual workers may not particularly care where their back pay comes from, but in the long run they are worse off in their dealings with employers if they are represented by unions that have been seriously weakened by damage awards. Moreover, the Court's ruling pits workers against their unions any time they are the victims of contract violations that the grievance machinery could not remedy. The union has become the employer's first line of defense against workers suing to vindicate their rights under collective bargaining agreements. And to protect their own interests, unions have become as zealous as employers in stifling employee suits. The Court has therefore maneuvered unions into a quasi partnership with employers as enforcers of workplace discipline.

As a result of other recent decisions, workers must fulfill strict procedural requirements on employees before they may bring their claims to court. In *Clayton v. International Union, United Automobile Workers* (1981) the Court held that employees must exhaust not only their contract grievance procedures but also lengthy and complex internal union appellate procedures before they may sue their employer for breach of contract. During the same term, in *United Parcel Service v. Mitchell*, the Court reduced the time limit for filing such suits from the existing three to six years, depending on state laws, to thirty to 120 days. This was too severe even for the Burger Court, and two terms later it extended the period to six months. The practical effect of such procedural obstacles has been to dry up breach-of-contract litigation. Today few employees are able to secure relief from workplace injustices except through their union grievance machinery. Thus, while the Warren Court's "bulwark" against such injustices is still alive in theory, it is of little practical value.

Employees' statutory right to engage in concerted action for mutual benefit, aid and protection obviously cannot be exercised if employees are afraid to talk to one another about workplace problems. One increasingly popular management device for chilling employees' attempts to engage in legal "concerted activities," or for nipping them in the bud, is the libel/defamation action. If employees say something critical about management, they may suddenly find themselves having to defend a multimillion-dollar lawsuit. Last year, in *Bill Johnson's Restaurants v. National Labor Relations Board*, the Court overruled a line of N.L.R.B. decisions that had barred such suits. Although the Court upheld the board's authority to order companies to reimburse employees for legal fees in cases the employees had successfully defended, it sharply tilted the balance between the rights of employers and employees against the latter, who will have difficulty raising the tens of thousands of dollars needed up front to defend a libel action. Employers would not file such suits if they could not afford to pay hefty legal fees, which are generally tax deductible. In effect, the Supreme Court has given them a license to undermine public policy with public funds.

An equally damaging decision for workers came in 1981 in a case involving a company that had decided to shut down one of its facilities and terminate the employees there. Although the Court had traditionally upheld the absolute right of employers to go out of business, it had also held that employers must bargain with unions over partial shutdowns. In *First National Maintenance Corp. v. National Labor Relations Board*, however, the Court removed this particular category of management decision-making from the list of mandatory subjects of bargaining. The Court speculated that bargaining over decisions to shut down facilities would be unproductive, would increase the employer's financial losses and could even exacerbate conflict. The purpose of collective bargaining—to provide a vehicle for ventilating conflict, thus alleviating tensions between labor and management—was effectively thwarted. The Court held that

> in view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

By weighing the subjective costs and benefits of bargaining from a management perspective, the Burger Court has given the ardently pro-management Reagan appointees on the N.L.R.B. a license to overhaul long-settled labor principles. And the board has begun to do that with a vengeance. Although the Court and the N.L.R.B. continue to pay lip service to the principle that plant closings and job subcontracting motivated primarily by a desire to reduce labor costs are illegal, the burden of proof has been put on those who would challenge an employer's action. That burden is practically impossible to meet, since such policies are adopted in the security of the board room by managers who can always wrap their decisions in complex economic justifications. Moreover, N.L.R.B. procedures do not grant

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the subpoena power needed to develop evidence to refute management claims.

The Court has struck a blow at labor's efforts to organize new categories of workers with its ruling in 1980 that faculty members at Yeshiva University were not entitled to unionize because they were part of management, a view that anyone familiar with the way universities are run knows is unfounded (*National Labor Relations Board v. Yeshiva University*).

The most notorious (though short-lived) Burger Court decision harmful to workers, this year's *National Labor Relations Board v. Bildisco & Bildisco*, held that employers who had filed for protection under the Bankruptcy Act could abrogate their collective bargaining agreements. That tipped the balance so far in favor of employers that Congress has already passed a law requiring bankruptcy judges to approve any modifications of labor agreements before they can be implemented.

The Burger Court may believe that such Congressional action to overrule its decision reflects the healthy functioning of our constitutional system. In truth, it reflects a Court that is well to the right of public opinion. Where Congress has spoken—as it has on many of these matters—it is the Court's job to construe the statutes so as to promote the lawmakers' objectives, not to undermine them and force Congress to enact yet another law. Congress, after all, is functionally incapable of supervising the Court. Only the most extreme decisions are likely to be legislatively overruled, with the result that employees' rights under the nation's labor laws will be narrowly confined, and Congress's objectives frustrated.

The picture is not totally black. In two recent decisions, the Court strengthened the hand of individual workers involved in safety disputes with employers. In *Whirlpool Corp. v. Marshall* (1980), the Court upheld a Labor Department regulation that prohibits employers from firing workers who refuse to perform abnormally dangerous assignments, despite the absence of any explicit statutory authorization for the regulation. And this year, in *National Labor Relations Board v. City Disposal Systems*, the Court affirmed an N.L.R.B. decision ordering the reinstatement of a truck driver who refused to drive a vehicle with faulty brakes. The company had attacked the board's decision on the ground that the driver's conduct was not taken in concert with other employees, so that the board lacked the authority to order his reinstatement. Unfortunately, at the same time the Court was affirming the N.L.R.B. doctrine protecting "individual concerted activity," the newly constituted Reagan board was publishing its own decision rescinding that doctrine.

In 1959 Congress enacted the Landrum-Griffin Act in response to revelations of corrupt and undemocratic union practices made during the McClellan committee hearings on labor racketeering. It bore the Kennedy stamp: Robert Kennedy was chief counsel to the McClellan committee and was largely responsible for conducting the hearings, and John Kennedy managed the bill on the floor of the Senate.

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The cornerstone of the Landrum-Griffin Act is a Union Members' Bill of Rights in Title I, patterned after the Constitution's Bill of Rights. Among other things, the statute prohibits unions from infringing members' freedom of speech and assembly, and requires unions to conduct periodic secret-ballot elections for officers. Its overall objectives were to make unions accountable to their members through the democratic process and to strengthen the hand of workers in their dealings with their union officials.

Those are particularly difficult goals to attain, since unions are one-party states. The union and its administration are wrapped in the flag, and dissent is equated with disloyalty. The leadership dominates communication, controlling the newspaper, which typically presents only the leadership's views, usually with much adulation. Incumbent officials hold the keys to the union treasury and can take full advantage of political patronage. They can groom their successors, reward loyal subordinates and eliminate potential opposition through appointments. Through their control over members' jobs, officers can reward their friends and punish their political enemies through hiring hall referrals and grievance processing. Under those circumstances there is little opportunity for any kind of organized opposition to form.

Possessing a right is only half the battle; one must also be able to secure relief when the right is infringed. For better or worse, the Union Members' Bill of Rights was left to members to enforce by bringing suits in Federal courts. To some extent, the Court has facilitated member suits to vindicate their rights. In 1973, it held that unions found guilty of interfering with members' freedom of speech would normally have to pay the members' attorney fees. As a result some attorneys are now willing to represent unionists on a contingent fee basis. And this past term, in *Local 82, Furniture and Piano Movers v. Crowley*, the Court ruled that member suits arising out of an election could be heard and violations remedied during the election so long as the remedy did not delay the election or force a rerun.

But these two victories for union members pale beside two 1982 decisions that strengthened the hand of officials intent on repressing democracy and retaining dynastic control of unions. Incumbent union officials not only possess vast political advantages over insurgent candidates, they also have ready access to campaign funds from the union staff. Insurgent candidates have no comparable sources and often must raise funds from outside. While no candidate should solicit or accept contributions from employers with whom the union bargains or whose shop it might seek to organize, there is no reason candidates should be prohibited from accepting contributions from friends who do not hold a card in their particular union. Barring contributions from any "outsider" serves only to increase the already overwhelming advantages of incumbents.

Nevertheless, in *United Steelworkers of America v. Sadlowski* the Court upheld a union ban on outsider contributions. In 1977, rank-and-file candidate Ed Sadlowski mounted a substantial challenge to incumbent Lloyd McBride for the presidency of the steelworkers' union. McBride raised 85 percent of his campaign funds from the union's staff. Sadlowski had to look to family, friends and others; none of the money he raised came from anyone with actual or potential collective bargaining relations with the union. Following its electoral scare, the incumbent union administration crafted a rule forbidding candidates to accept contributions from nonmembers, a rule which would have barred even Sadlowski's father, a retired steelworker with thirty years' service, from contributing.

Both the district court and the court of appeals concluded that the rule violated the Landrum-Griffin Act. The appellate court relied on the Supreme Court's 1976 opinion on the Federal Election Law in *Buckley v. Valeo* and reasoned that by denying Sadlowski funds, the union was infringing his right of free speech, making it difficult, if not impossible, for him to communicate his views to other members. The Supreme Court reversed, stating simply that while Title I may have been modeled after the Bill of Rights, union rules need not meet stringent First Amendment standards and are valid "so long as they are reasonable." But as Prof. Clyde Summers, the architect of Title I, so poignantly observed:

> This reverses reality. Free speech needs even wider scope in a one-party state . . . because there is no free press and no established opposing party to criticize those in power. . . . The purpose of the statute was to loosen the iron grip of oligarchy, not tighten its stranglehold.

Following the Court's decision, a number of unions quickly adopted their own outsider rules, and it is just a matter of time before most union oligarchies follow the United Steelworkers' lead. Sadly, only in those unions where democracy is already alive and well, and where the protections of Title I are less crucial, will opposition groups be able to block administration moves to amend their constitutions to prohibit outsider campaign contributions.

The other decision by the Burger Court that has fortified the political power of incumbent officials and weakened union democracy is its 1982 ruling in *Finnegan v. Leu*. There, an insurgent in a union local won an election and promptly fired all the business agents who had supported the incumbent. The agents argued that they should not have been punished solely for their political beliefs, an argument

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that has been successfully made by public officials. Contrary to the normal practice of broadly interpreting remedial statutes, the Court read the Landrum-Griffin Act narrowly and ruled that it proscribed only retaliatory actions that affected an employee's membership rights. Thus, while a union cannot suspend or expel a member, it can take away his or her livelihood as a staff employee because of political beliefs, speech or association. Members who hold union jobs are among the few who possess sufficient knowledge and experience to mount credible campaigns against incumbent officials. Now they can be muzzled unless they are willing to forfeit their jobs. The dangers that patronage poses for the democratic process have been recognized by the Hatch Act and by various Supreme Court decisions limiting the discharge of public employees because of their political affiliation or activities. In these labor cases, however, the Court ignored the obvious analogy and found that the protections necessary to democracy in an open two-party system were not required in a one-party system.

With these decisions, the Burger Court has prevented the Landrum-Griffin Act from "loosening the iron grip" of union oligarchy as Congress intended. □

SOCIAL WELFARE

Concern for the Basic Necessities

HERMAN SCHWARTZ

Conventional wisdom has it that the Burger Court will not protect the individual's right to food, housing, medical care, education and the like. In contrast to the U.N.'s Universal Declaration of Human Rights and some state constitutions, the U.S. Constitution nowhere refers explicitly to such economic and social rights. And not once but many times the Court has explicitly refused to interpret the Constitution as implying such rights, despite persistent efforts by academics and others to persuade it to do so.

The picture, however, is not quite as gloomy as it first appears. Admittedly, the Court's language denying such rights seems unequivocal. As early as 1970, during the first term of the Burger Court, a 6-to-3 majority in *Dandridge v. Williams* declared that even though "public welfare assistance . . . involves the most basic economic needs of impoverished human beings," fundamental rights in the constitutional sense—those meriting the highest degree of judicial protection—are not involved. Laws that discriminated in allocating benefits were considered valid so long as there was "any conceivable rational basis" for the discrimination.

Two years later, in *Lindsey v. Normet*, the Court found no fundamental right to "decent shelter, . . . safe and sanitary housing" and under the same toothless test, upheld eviction procedures for nonpayment of rent that discriminated against poor people. The following year, when school-district financing was before it in *San Antonio Independent School District v. Rodriguez*, the Court refused to regard education as so basic a right that any financing scheme that put low-income children at a disadvantage be justified by a compelling state interest.

Even where the recognized fundamental right to abortion was involved, in *Maher v. Roe* in 1977, the Court upheld bans on public funding, which obviously disadvantage poor people.

The Court's apparent indifference to the plight of the poor was exemplified by *United States v. Kras* (1973), in which it allowed the government to exact a $50 fee from those trying to obtain a discharge in bankruptcy. Justice Potter Stewart, no softie, complained that "the Court today holds that Congress may say some of the poor are too poor even to go bankrupt."

But that is not the whole story. The Court has indeed rebuffed efforts to equalize economic benefits. Nevertheless, using one doctrinal rubric or another, often having little to do with the real interest involved, it has consistently refused to countenance the state's *total* refusal to provide for the basic economic and social needs of a group or individual when the state provides such benefits to others.

The most recent example is in the area of education. Two years ago the Court forced Texas to provide public education to the children of illegal aliens. While carefully avoiding a declaration that public education is a right, the majority in *Plyler v. Doe* stressed that the importance of education made it more than "merely some governmental 'benefit.'" Justice Lewis Powell, who wrote the majority opinion in *Rodriguez*, and Justice Harry Blackmun, who had voted with Powell then and who shifted to make the *Plyler* majority, contrasted the recent case with *Rodriguez*, in which, they noted, no children were "totally deprived of all education." In a footnote, Powell added that, similarly, it would be "impermissible" to deny the children of illegal aliens "welfare assistance made available by government to all other children."

Despite the Court's emphasis in *Plyler* on education's "fundamental" and "pivotal role," it has not limited its protection of social and economic rights to that area. The term before Warren Burger became Chief Justice, the Court invoked the constitutional right to travel in striking down a one-year residency requirement that denied welfare assistance to people who had just moved to Pennsylvania, Connecticut and Washington, D.C. (*Shapiro v. Thompson*). It used the same approach in requiring Arizona to provide medical care to an indigent newcomer, in *Memorial Hospital v. Maricopa County* (1974), and Georgia to provide abortions, in *Doe v. Bolton* (1973). Although all three cases relied on the right to travel, the opinions stressed that welfare assistance and medical care were "basic necessities of life."

In 1973 the Court also declared that the government could not deny food stamps to indigent households, in *U.S. Department of Agriculture v. Murray* and *U.S. Department of Agriculture v. Moreno*, purportedly because the various bases for the denial were not "rational," the reason given in the

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Texas education case. A year later, in *Wohlgemuth v. Williams*, the Court used the same rational-basis test to uphold a lower court's order forcing Pennsylvania to provide public assistance to a 15-year-old. On the other hand, in a 1981 case involving denial of a $25 monthly Social Security "comfort allowance" (*Schweiker v. Wilson*), a 5-to-4 majority upheld the denial under the rational-basis test, explicitly noting that for the nonrecipients "most subsistence needs are met by the institution" and the comfort allowances are "not needed." The rational-basis test, however, is usually so easy to satisfy (in a recent opinion Justice William Rehnquist wrote that the criterion is whether the government achieved its purpose in a "patently arbitrary or irrational way") that the Court has almost always allowed the challenged discrimination to survive. In *Murray*, *Moreno* and *Wohlgemuth* the government did have a plausible rational basis for the denial of the benefits, and yet it lost. Although it isn't clear whether the Court was applying strict or what is called middle-level scrutiny, those cases involve judicial review that is unquestionably much more exacting than the Court uses in typical rational-basis situations.

Why the difference?

The answer seems to be that where basic necessities are concerned, even a conservative Court is likely to gag at a total denial. Although the decision in the Texas education case was close—5 to 4—the others were not.

Obviously, one cannot say that the Supreme Court has fully recognized a right to the basic necessities of life. But if the significance of such recognition is to make it difficult for government to deny benefits totally to one group while making them available to others, then the absence of an explicit recognition of "fundamentality" is not so important. Here, the Burger Court may have behaved more decently than one would have expected. □

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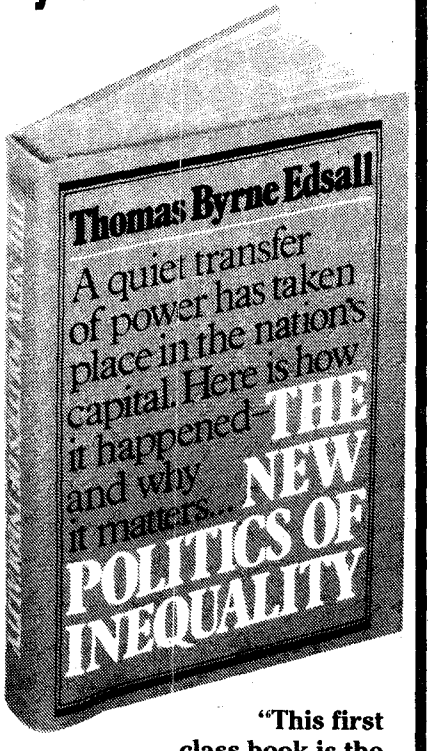
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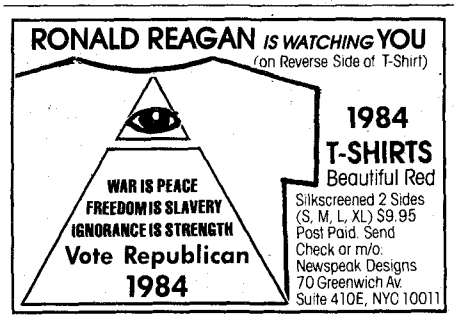

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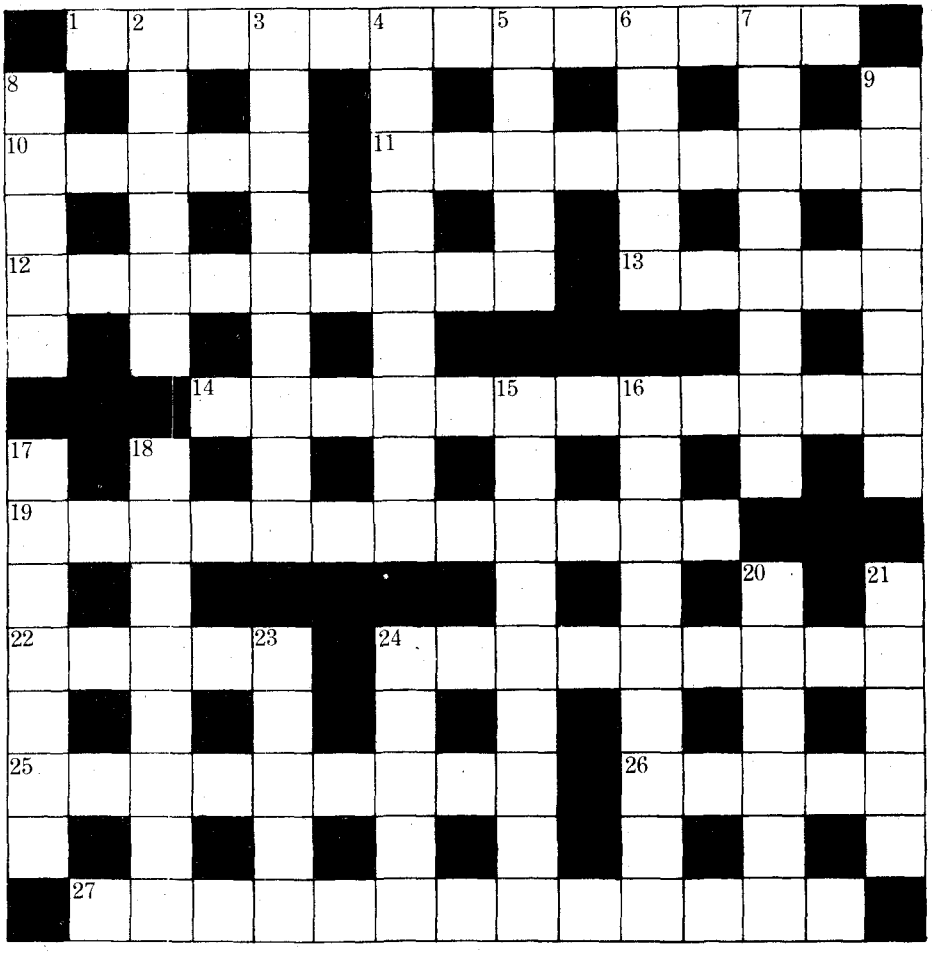
Crossword Puzzle No. 2024

FRANK W. LEWIS



ACROSS

1 The design of a cellar bedpost, for those who are on their toes. (5,2,6)
10 If it's uncooked inside, you'll get a pound back, resulting in a noisy quarrel. (5)
11 A battle cape might be square to Londoners. (9)
12 If this is what they dish out, no wonder poets starve! (4,5)
13 It's not natural with a fine edge! (5)
14 Not where they buy and sell extras. (Marks up trees in the process.) (12)
19 Direct someone's attention to this particular magazine—there's something to argue about here! (5,2,5)
22 Concerning wrong-doing, it might just ooze out! (5)
24 Good living, as they say—but might lead to too much first and last at the middle! (9)
25 Discharge the boss, who might be head-of-station. (4,5)
26 A broken line, possibly from outer space. (5)
27 How to put your father-in-law in a grave position with reciprocity? (13)

DOWN

2 Talked a lot of what movies might be, if "ordinary" instead of PG or X, for example. (6)
3 It's meet, in part, to make the upper Slav safe. (4,5)
4 It's enough to put off a man—but not with soap! (9)
5 Even a cheapskate might have one, but such an individual was once dashing. (5)
6 Fire might be out until one does, but they may be hard to bear. (5)
7 Such a rag never would fit a man who chases things. (8)
8 Stern to a degree—like a sailor's behind. (5)
9 Not made by an amateur model—though one might do it in pressing a suit. (5)
15 Is refining fuel smart, or just authoritative? (9)
16 Suitable for a gangster film or a violent play—you might get plastered this way. (9)
17 The first writing of United Press in the wind? (7)
18 Primitive race? You've probably never seen such a picture before! (5-3)
20 Though good to the French, it comes to nothing. (No wonder it gets canned!) (6)
21 Such a gun is manufactured to show what employers might be doing. (5)
23 What's nice about the capital of Hungary? It's supposed to be an appropriate place! (5)
24 Tuck, for example, taken in old tales. (5)

SEE LAST WEEK'S SOLUTION AT LEFT

PUZZLED?

No more cross words. If you don't see why "Lures" are "Ground Rules," send for those of Mr. Lewis to *The Nation*, 72 Fifth Avenue, New York, NY 10011.

EVENTS.

JOIN THE HARVEST

Work brigades to Nicaragua begin in late November, through February. Spend two weeks or one month living and working with Nicaraguans picking coffee, cotton. Approximate cost for one month: $700 from Miami.

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ROSENBERG DEBATE UPDATE

The historic debate, "Were the Rosenbergs Framed?" sponsored by *The Nation* and *The New Republic* at Town Hall on October 20, can now be purchased in typed transcript ($24) and/or tape cassette ($19). Special discounts are available on orders of five or more. Send check or money order payable to The Nation to: "Rosenbergs," *The Nation*, 72 Fifth Avenue, New York, NY 10011. (A project of the Nation Institute.)

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A dialogue sponsored by the
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Guest Speaker: HON CLARENCE M. PENDLETON JR.,
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Presiding: Prof. CHRISTOPHER L. MORSE
Union Theological Seminary

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Bird and Holland on GLOBAL POLITICS.
Calvin Trillin on UNCIVIL LIBERTIES.

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